CASE AND COMMENT

CONSTITUTIONAL LAW — ALBERTA BILL OF RIGHTS ACT— DOMINION'S EXCLUSIVE LEGISLATIVE JURISDICTION OVER BANKING — SEVERABILITY OF THE ACT — ULTRA VIRES.—The Judicial Committee of the Privy Council, in a judgment recently delivered by Viscount Simon,[1] has declared *ultra vires* the whole of the Alberta Bill of Rights Act.[2] The case came before their Lordships by way of appeal by the Attorney-General for Alberta from a judgment delivered by the Supreme Court of Alberta on a reference as to the validity of the statute. The Alberta Supreme Court had held Part II of the act *ultra vires* on the ground that it constituted legislation on the subject of Banking, reserved to the exclusive legislative jurisdiction of the Parliament of Canada by s. 91 (15) of the British North America Act, and on the further ground that it prohibited Canadian chartered banks from carrying on business in the province of Alberta without a provincial licence. The Attorney-General for Alberta contended on appeal, against the Attorney-General for Canada and the Canadian Bankers' Association, that Part II should have been upheld as legislation in relation to "property and civil rights in the province". The Attorney-General for Canada contended on cross-appeal that the whole act was invalid in that the balance of the act was not severable from Part II and should not be separately upheld. Thus their Lordships were concerned with two questions, firstly, the question of the validity of Part II of the act and, secondly, on holding Part II of the act to be invalid, the question of the severability and independent survival of the remainder of the act.

It was held that Part II of the act was *ultra vires* solely on the ground that it was legislation within the subject of Banking exclusively reserved to the Parliament of Canada. Their Lordships might easily and with justification have discussed the validity of the statute from the point of view of other of the exclusive reservations to the Canadian Parliament. This they apparently did not choose to do. Their Lordships' judgment, in dealing with Part II, proceeds in accordance with well-established principles of Canadian constitutional interpretation and it illustrates the important limitations on the seemingly broad authority conferred on the provincial legislatures by the phrase "property and civil rights in the province" in s. 92 of the British North America Act which inevitably arise when that grant of power is properly regarded in the light of the remainder of the act.

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[1] [1947] 2 W.W.R. 401.
[2] Statutes of Alberta, 1946, c. 11.

The Alberta statute was formally entitled "An Act Respecting the Rights of Alberta Citizens" and it contained a long preamble reciting that Canadians had fought in two wars for the declared purpose of assuring a free democratic society with social and economic security; that there existed a sacred duty of the Canadian people to fulfil these aims; and that the Province of Alberta possessed all the human and material resources necessary to provide to Alberta "citizens" (later defined by the act) the material security essential to the enjoyment of a personal freedom. There followed three final recitals of such importance in illustrating the scheme of the act that they should be stated in full:

> Whereas *The British North America Act* imposes upon the Province the constitutional responsibility of providing its citizens with an opportunity to realize and enjoy their property and civil rights; and
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> Whereas the discharge of the Province's responsibility necessitates the recognition of certain basic rights and responsibilities of citizenship and requires that its citizens have the necessary access to their resources so that they may produce the goods and services they require and provide for their equitable distribution in a manner that will ensure to all an opportunity to obtain social and economic security with personal freedom; and
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> Whereas the control of policy with respect to the issue, use and withdrawal of credit primarily determines the extent to which the citizens of Alberta may develop and enjoy the use of their resources and therefore must be a function of the electorate of the Province to be discharged on their behalf by their democratically elected representatives;
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> Now therefore His Majesty . . . . enacts as follows:

There followed a definition section for the entire act and after that a Part I, which set forth the freedoms, rights and duties of every "citizen of Alberta". This Part, excepting the final two sections (13 and 14) thereof, was declaratory in form, declaring to each citizen a *freedom* (to be exercised within the laws) in respect to certain activities, which included worship, expression, assembly, the choice of work, the ownership of property and, finally, freedom "to do or refuse to do any act or thing within the limitations of the laws in force in the Province". These sections impressed their Lordships as being merely declaratory of common-law rights. They were followed by a series of declarations that certain *rights* should henceforth be appended to Alberta citizenship which, in general, included the right to gainful employment (or in the absence thereof, to a social security pension) and the right to certain defined minimum necessities of life, educational benefits and medical

benefits. The *duties* of citizenship were then set out by section 13 of the act as follows:

> 13. In consideration of the foregoing rights of citizenship it shall be the duty of every citizen of Alberta to discharge faithfully his responsibilities as an elector and citizen of Alberta, to observe and comply with the laws of the Parliament of Canada and of the Legislature of Alberta and other laws in force in the Province, to respect the rights of other citizens, and to exercise his initiative and enterprise in promoting the spiritual, cultural and material welfare of the Province.

Of this section their Lordships aptly observed, "There is nothing in the Act to indicate what is to happen to a citizen who does not do his duty in these respects".

Section 14, the final section of Part I, simply vested the Lieutenant-Governor in Council with certain powers of classification and regulation. It is to be noted that this was the only section of Part I which suggested that this Part of the act might somehow have been operative.

Part II of the act then proceeded to provide for the fulfilment of the declared rights of Alberta citizens to economic and social security from the resources of the province by a means or method the operation of which I shall make no attempt to describe, but which their Lordships have judicially noticed as seeming "plainly to be an application of the economic theory of what is called 'Social Credit' ".

That Parts I and II, though wholly different, should have been enacted in combined form in the one statute calls for some comment. The appearance of a provincial Bill of Rights in form somewhat resembling Part I was perhaps to have been expected in view of recent growth in the popularity and agitation of those who believe that we may assure ourselves of higher political and social freedom through such legislation. But the reason for having a provincial declaration of rights linked with a novel scheme to promote production and distribution in a province is less clear. The answer may, I think, be found upon a close examination of the recitals quoted above. It seems that those who drafted the legislation combined these two features of the legislation in order to give an emphasis to the property and civil rights aspect of the legislation by having it viewed as an entire scheme. The economic welfare of the people of any province can, it is true, be described in terms of their enjoyment of property and of civil rights in the province and it is not unreasonable to suppose that the Alberta legislators, by combining all this legislation, intended to disclose their

ultimate legislative purpose and objective as having relation only to property and civil rights in the province. In other words the legislature sought by means of a broad declaration of ultimate aim and desired objective, described in terms of property and civil rights, to give constitutional support to a scheme which, in the opinion of the legislature, would operate to bring about that result.

This approach to the problem of constitutionality is fundamentally in error and is based on a misconception of the use of the phrase "Property and Civil Rights in the Province" in s. 92 (13). Referring again to the recitals quoted above, I wish to point out that the British North America Act *does not*, whether fortunately or unfortunately, impose upon the provinces any "responsibility", constitutional or otherwise. Section 92 (13) of the British North America Act confers on the provincial legislatures the exclusive power to make laws in relation to all *matters* coming within the class of subject, "property and civil rights in the province", and does not confer on them a power or duty to legislate so as to transform or regulate what may be regarded as the property rights and civil rights of provincial residents; or, to express the proposition in the terminology used by our courts, the power is one of making laws in relation to matters coming within property and civil rights in the province and not of legislating merely to "affect" property and civil rights in the province.

The problem is in each case therefore to ascertain what *matters* come within the meaning in s. 92 of the phrase "Property and Civil Rights in the Province" and, in making this determination, it is necessary to bear in mind the closing words of s. 91, comprising the so-called "deeming clause", which expressly *enact* that "any matter coming within any of the Classes of Subjects enumerated in this section [91] shall not be deemed to come within the Class of Matters of a local or private nature comprised in the Enumeration of the Classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces", and the final portion of the introductory clause of s. 91 which expressly *declares* that "the exclusive Legislative Authority of the Parliament of Canada extends to all matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—

"15. Banking, Incorporation of Banks, and the Issue of Paper Money".

The "deeming clause" above quoted has been interpreted to include within its reference s. 92 (13)[3] so that, by virtue of the above sections, those matters coming within the subject of "Banking" are not matters coming within the subject of "Property and Civil Rights in the Province" and are reserved to the exclusive legislative jurisdiction of the Parliament of Canada.

The problem of ascertaining the validity of a statute such as the Alberta Bill of Rights Act is thus one of determining whether the matters dealt with in the legislation are banking matters, in which case the legislation would be invalid regardless of how seriously it might transform by its operation the property rights and civil rights of persons in the province, or whether the legislation deals with matters of property and civil rights exclusive of banking matters (or matters within other grants of exclusive legislative jurisdiction to the Parliament of Canada), in which case the legislation would be valid notwithstanding that it may affect banking and interfere with the smooth operation of any banking business. The power and jurisdiction to make this important and subtle determination rests with the judiciary and they insist on their right to exercise it independently of those referred to in the recitals of the Alberta Bill of Rights Act as the "democratically elected representatives of the people". Thus they will allow no Canadian legislature or parliament by recitals of valid purpose, good faith or avowed intention, or by way of legislative form or combination, or by other means, to interfere with their judgment on what they will conceive independently to be the true substance of the legislation or the matter dealt with by it. It cannot be denied that this power of the courts is very broad, especially when they may, in its exercise, take into account matters exterior to the legislation under review.[4] There are those in Canada, believing in the British tradition of parliamentary sovereignty, who are constantly being shocked by this. But ours is a constitution based historically on compromise, so that here, as elsewhere where legislative jurisdiction is divided, the theory of legislative sovereignty must be stated with qualification — the legislatures and parliament are each sovereign but only within the ambit of their powers. The power of defining the ambit of each rests with our courts and ultimately with the Judicial

[3] *Attorney General for Ontario* v. *Attorney General for Canada*, [1896] A.C. 348, at p. 359.

[4] See, for example, the judgment of the Privy Council delivered by Lord Maugham in *Attorney General for Alberta* v. *Attorney General for Canada*, [1939] A.C. 117, at pp. 130–132.

Committee. But with this there goes to them undoubtedly a large measure of the responsibility for the welfare and good government of this nation. It is submitted with respect that this responsibility they should openly recognize and be prepared to assume.

The function of determining the matter dealt with by legislation, plus that of deciding whether this matter comes within one or other of the expressions used in the British North America Act, is frequently referred to by the courts as ascertaining the "pith and substance" of the legislation. Their Lordships' conclusion in this regard, with reference to Part II of the present act, was shortly stated by them as follows:

> It is true, of course, that in one aspect provincial legislation on this subject affects property and civil rights, but if, as their Lordships hold to be the case, the 'pith and substance' of the legislation is 'Banking' (the phrase 'pith and substance' can be traced back to Lord Watson's judgment in *Union Colliery Co. of B.C.* v. *Bryden*, [1899] AC 580, 68 LJPC 118) this is the aspect that matters and Part II is beyond the powers of the Alberta legislature to enact.

Their Lordships came to the above conclusion concerning Part II after having given careful consideration to the whole of the enactment, including the recitals, but in supporting this conclusion they gave special attention and emphasis to certain of its features, revealed by sections 15, 17, 20 (2) and 24 in Part II.

Section 15 was the definition section which defined "Credit Institution" to exclude the Bank of Canada but in terms which were clearly meant to include the chartered banks created by or under Dominion legislation.

Section 17 conferred on a provincial Board of Credit Commissioners the authority to license all "credit institutions" in the province. This section their Lordships interpreted as including the power to refuse such a licence.

Section 20 (2) provided:

> 20 (2). For the purpose of effectively controlling and regulating the issue and withdrawal of credit deposits within the Province, the Board, with the approval of the Lieutenant Governor in Council, shall issue to licensed credit institutions Alberta Credit Certificates in such amounts and on such terms as the Board may deem advisable in order to enable such credit institutions to issue credit deposits to customers over and above the deposits against which a reserve of currency is held, and the amount of Alberta Credit Certificates so issued shall be debited to the Consolidated Credit Adjustment Fund.

On this provision their Lordships made the following observations:

> Their Lordships call attention to the phrase 'licensed credit institutions' in this subsection as clearly indicating that the enactment purports to confer on a provincial authority power either to grant or to withhold the issue of credit certificates to any chartered bank and thus to restrain any bank from creating an expansion of credit by loans exceeding its reserve of currency.

Section 24 was quoted in full by their Lordships and read as follows:

> 24.—(1) Every licensed credit institution shall keep and operate the accounts of its customers, and arrange for the transfer of credit deposits from one account to another account in such manner and by such instruments as the Board may from time to time direct and the Board and its duly authorized agents shall at all times have access to the books, records and accounts of such credit institutions, and every member of the Board or its authorized agents having access to such records shall take and be bound by an oath of secrecy properly executed before a person authorized to administer oaths within the Province.
>
> (2) The Board may require every licensed credit institution to hold against all or any credit deposits of customers, not being deposits against which a reserve of currency of an equivalent value is held, Alberta Credit Certificates of an aggregate value not exceeding the aggregate value of such credit deposits.
>
> (3) In the case of any credit institution licensed to operate within the Province, having branches and operating outside the Province, the proportion of its reserves of currency to its total deposits within the Provinces shall be deemed to be in the same ratio as its total reserves of currency to its total deposits in Canada.
>
> (4) The Board may direct that any balance due by one credit institution to another credit institution on account of any transfers of credit deposits between their respective customers shall be settled by the transfer of Alberta Credit Certificates of a corresponding value.

The importance and meaning which their Lordships attached to this provision appears from their following comment:

> Sec. 24 is of special importance, and indeed contains the essence of the scheme requiring the deposits of the banks to be backed to the extent of 100 per cent by currency or by the proposed credit certificates.

Placing special emphasis on the above provisions their Lordships drew the following conclusion concerning Part II:

> It cannot be disputed that the object and effect of Part II are to interfere with and control the business carried on by a chartered bank in the province by which (subject to any restrictions imposed by the Dominion legislation) it makes loans to customers to a total amount which exceeds the liquid assets which the bank holds.

On the question of whether or not the making of loans involving an expansion of credit came within the meaning of the word "Banking" as used in the British North America Act, their Lordships were confronted by argument on behalf of the Attorney-General for Alberta to the effect that the term "Banking" was not ordinarily understood at the time of Confederation to include the making of loans involving an expansion of credit since at that time banks dealt in credit only to the extent of their cash reserves.[5] While their Lordships were by no means willing to concede such restricted scope to the business of banking in 1867, they indicated clearly that they should not be bound by 19th century concepts in defining the meaning of words used in our constitution. They reveal this view at page 410 of the judgment:

> Their Lordships entertain no doubt that such operations are covered by the term 'Banking' in sec. 91. The question is not what was the extent and kind of business actually carried on by banks in Canada in 1867, but what is the meaning of the term itself in the Act. To make what may seem a frivolous analogy, if 'skating' was one of the matters to which the exclusive authority of the Parliament of Canada extended, it would be nothing to the point to prove that only one style of skating was practised in Canada in 1867 and to argue that the exclusive power to legislate in respect of subsequently developed styles of skating was not expressly conferred on the central legislature. Other illustrations may be drawn from sec. 91 as it stands: Take, for example, head 5, 'Postal Services'. In 1867 postal services in Canada were rendered by the help of land vehicles, but nobody could contend that the modern use of aeroplanes for carrying mail is, on that account, not within the phrase.

This approach to the meaning of words defining jurisdiction in the British North America Act has been suggested before by the Privy Council[6] but at no time previously has it been so affirmatively stated. It is refreshing to know that subsequent social and economic development has had some effect on the meaning of words used by the Imperial legislators of 1867 and further to suppose that their meaning may be further altered by such matters in the future. The view illustrated above indicates some departure from the principle of seeking solely for the intended meaning of the Imperial legislature when passing the act.

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[5] For a statement of this argument as presented in the Province's brief before the Alberta Court of Appeal, see the judgment of that court delivered by Harvey C.J.A., [1947] 1 D.L.R. 337, at pp. 341 *ff.*

[6] See, for example, the statements made by their Lordships with reference to the meaning of "Criminal Law" in *Proprietary Articles Trade Association* v. *Attorney General for Canada*, [1931] A.C. 310, *per* Lord Atkin at p. 324.

In dealing with the problem of the severability of Parts I and II their Lordships have helped to clarify the law on a point that has heretofore been somewhat confused. They state the proper approach to the problem of severability thus:

> There remains the second question whether, when Part II has been struck out from the Act as invalid, what is left should be regarded as surviving, or whether, on the contrary, the operation of cutting out Part II involves the consequence that the whole Act is a dead letter. This sort of question arises not infrequently and is often raised (as in the present instance) by asking whether the legislation is *intra vires* 'either in whole or in part,' but this does not mean that when Part II is declared invalid what remains of the Act is to be examined bit by bit in order to determine whether the legislature would be acting within its powers if it passed what remains. The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is *ultra vires* at all.

From this it would now seem clear that the question always to be asked is not, Could the legislature have enacted so as to have made the unobjectionable remainder law? but, Did the legislature so enact as to have intended to have made the unobjectionable remainder law? Their Lordships had already declared earlier in their judgment their finding that ". . . . the effective purpose of the Bill . . . . when it is read as a whole, seems plainly to be an application of the economic theory of what is called 'Social Credit' ". This finding they later confirmed more specifically as follows:

> Looking at the Act as a whole, it is clear that its intent and purpose is to establish machinery sufficiently complete in itself to secure that, in accordance with the economic concept of Social Credit, it will severely restrict chartered banks from continuing to carry on a legitimate part of their present operations.

Their Lordships pointed out that portions of the remainder of the act referred unmistakably to Part II, that without Part II the remaining portions were largely inoperative and, further, that certain portions thereof, such as the definition of "Social Security Pension", were meaningless without having regard to Part II. Finally, by providing that the act could not come into force until the courts had certified that the entire act was valid, the legislature could not possibly have intended either Part to exist separately as law. On the basis of these considerations their Lordships ruled the entire statute *ultra vires*. It is submitted that their approach to the problem of severability simply

illustrates the importance, from the point of view of constitutional validity, of legislative intention in passing an act and, for this reason, that this judgment cannot be regarded as deciding that the separate passage of a bill of rights resembling Part I of the act here under review would be beyond the competence of the provincial legislatures.

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LIFE INSURANCE — BENEFICIARY PAYING PREMIUMS — CHANGE IN BENEFICIARY WITHOUT HIS CONSENT — WILL — QUEBEC — CIVIL AND COMMON LAWS COMPARED. — Assuming that the decision of the Supreme Court of Canada in *Adam* v. *Ouellette*[1] is final, this case is of interest to the Bar of all provinces, although it is ruled by articles in the Civil Code of Quebec. It decides that a testator may by will change the beneficiary named in life insurance policies without the consent of the beneficiary, even when the beneficiary has been paying the premiums thereon for his own benefit. The facts present one of the commonest situations in the transaction of life insurance.

In July 1914, Isaïe Adam (the appellant) together with his son, Oliva Adam (now deceased) signed an application to the Metropolitan Life Insurance Company for insurance upon the life of the son. The common form of twenty-payment life, participating policy was issued naming the son as the person whose life was insured and naming the father as the person to whom the insurance moneys were payable in the event of the son's death. The policy contained the usual provision reserving the right to change the beneficiary "sujet aux restrictions de la loi", at the instance of the person whose life was insured, without the consent of the beneficiary. The policy also provided how this change of beneficiary would be made, *i.e.* by a notice in writing filed with the Company at its head office, accompanied by the original policy, to be endorsed "en bonne et due forme". Such a change could be made only while the policy was in force and "s'il n'a été fait aucun transfert de la police tel que stipule ci-après". In case of a policy loan, an assignment to the Company of the policy as sole security for the loan was stipulated. Assignments

[1] *Adam* v. *Dame Ouellette, Metropolitan Life Insurance Company* (Mis-en-cause), [1947] S.C.R. 283; (1947), 14 I.L.R. 97. The judgment of the Quebec Court of King's Bench is reported in (1945), 12 I.L.R. 294.

were to be only on blanks furnished by the Company and filed at the Company's head office.

At the date of commencement of the insurance, the son was nineteen years of age, a student not yet employed and having no moneys of his own with which to pay premiums. The application contained the following question and answer: "Qui payera les primes? — R. Isaïe Adam". The father paid the first three annual premiums on the policy. In 1917 the son joined his father in their business partnership. Afterward, the premiums were paid out of moneys belonging to the business partnership of "Isaïe Adam et Fils", in which partnership (société) father and son were the only members.

After twenty years the policy became paid-up, subject to loans on security of the policy made by the Company to the insured with the concurrence of father and son, in May 1926 and in April 1938, which loans were outstanding and unpaid at the date of the son's death on January 6th, 1940. The policy bore an endorsement in these words: "This policy has been assigned to the Metropolitan Life Insurance Company as the sole security for a loan, the unpaid amount of which and of the interest thereon is a lien against the policy". The record does not show the application of the borrowed moneys. In all this period no change of beneficiary was made except the above-mentioned assignment.

After the death of the son his will was produced and filed with the Company containing the following provisions:

> Je donne et lègue à mon épouse Dame Marie Blanche Ouellette tous les biens, meubles, immeubles, argent, créances y *compris mes assurances et tous* autres biens et droits quelconques que je possèderai au jour et heure de mon décès pour lui appartenir empleine propriété à compter de mon décès, l'instituant ma légataire universelle en propriété mais à la condition qu'elle garde viduité et sans aucune obligation de faire inventaire ou donner caution.

The widow claimed the proceeds of the insurance policy, after deduction by the Company of moneys owing on the policy loan. The father claimed the same moneys as beneficiary named in the policy. The moneys in question having been deposited with the Provincial Treasurer, under the provisions of the Treasury Department Act (R.S.Q., 1941, c. 71, s. 58), this action was commenced to ascertain who was entitled to receive them.

The Superior Court allowed the father's claim. The Court of King's Bench (Appeal Side) set aside the judgment and dismissed the claim of the father with costs, giving the insurance

moneys to the widow as beneficiary of the policy. In doing so, the court was divided in opinion, three justices allowing the appeal and two dissenting therefrom. Thus, when the matter was presented to the Supreme Court at Ottawa, the Quebec judges, all of whom had given written reasons for judgment, had been equally divided, three to three, in favour of the respective claimants. In the Supreme Court of Canada one dissented from the judgment of the other four justices. The appeal was dismissed with costs.

The judgment of the majority of the Supreme Court, and the dissenting opinion, do not rest on the authority of previous decisions of that court; after examination of articles 1029[2] and 2591 C.C.[3] they proceed to apply one and the other of these articles to the facts of the case. The majority says that article 1029 does not affect the decision and that article 2591 rules it; the minority opinion says article 2591 is inapplicable and article 1029 rules it.

The strange thing about this case is that such simple, undisputed facts should give rise to such varying opinions and be finally decided by a majority vote, in the absence of relevant precedent. This is the result more than seven years after the death of the insured, the insurance moneys being still on deposit in court and the father now eighty-three years of age. Some will say that the parties would have been much better off if they had agreed to compromise their claims or to decide the question by flipping a coin. After the trial judgment, no material facts or legal principles were discovered by the appellate courts which were not clearly set forth for consideration in the decision of the learned trial judge. The opinions in the Supreme Court of Canada seem to be only echoes of the majority or dissenting opinions in the Court of Appeal. Nevertheless anyone who reads the reasons for judgment of the justices throughout the litigation must be favourably impressed by the care and fairness of the consideration given to the case and no less favourably impressed by the thoroughness and clarity of the presentation of the issue by counsel for the parties in the Supreme Court factums filed. No apologies need be offered for the parts taken by judges or counsel in the decision; the only thing which becomes steadily

[2] 1029. A party in like manner may stipulate for the benefit of a third person, when such is the condition of a contract which he makes for himself, or of a gift which he makes to another; and he who makes the stipulation cannot revoke it, if the third person have signified his assent to it.

[3] 2591. A policy of insurance on life or health may pass by transfer, will, or succession, to any person, whether he has an insurable interest or not in the life of the person insured.

more surprising, as the litigation proceeded, was the unpredictable quality of the final judgment. That the answer to such a question should have been unpredictable at this stage in the history of life insurance law is a matter of serious concern to everyone.

This writer would not presume to add any argument whatever to those with which the judges have already dealt. The purpose of this comment is to consider the practical consequences of the decision in relation to life insurance contracts in the common-law provinces, as well as in Quebec, and the possible need for remedial or clarifying legislation in all provinces, including Quebec.

It will be said that the uncertainty of the legal rights of the parties to this issue arises less from uncertainty in the law or legislation relating to life insurance, and more from the disregard for legal principles and sound practice with which business is transacted by persons who ought to know the relevant legal rules; rules were there to be followed. Perhaps if those who took the application for the insurance policy had properly understood the circumstances of the parties with whom they were dealing, a different form of policy would have been issued or further inquiries made to resolve the ambiguities of the application. It is doubtful whether the draftsman of the will had been given sufficient information respecting the policies of insurance with which the will assumed to deal or had asked for it. It may be the juridical attempt to do justice to parties in spite of such errors produces much of the confusion in our jurisprudence.

The proposal for insurance bears the signature of two applicants, father and son, but no indication as to who was the principal party to the contract of insurance with the insurer. Should it not be presumed from its form that the father desired to insure the life of his son, for his own benefit, that the father intended to pay the premiums and that the son was a consenting but, more or less, disinterested party to this transaction? Remembering that two persons sign as applicants, how shall one construe this question and answer: "Désirez-vous réserver le droit de changer de bénéficiaire en n'importe quel temps, sans le consentement du bénéficiaire désigne ci-après? R.— Oui"? Was the right reserved to the applicants jointly? Is it not reasonable to conclude that, in its financial aspects, if not in form, the person with whom the insuring company was making its contract was the father?

When issued, the policy was on the ordinary form used by the company for insurance of adults on their own applications,

when premiums are to be paid by the person whose life is insured for the benefit of a third party. According to the policy, the son was the person insured and also the person whose life was insured and the father was the person entitled to receive the insurance moneys in the event of his son's death, with no other recognition of the father as a party to the contract. Conceding the above argument, this was an inappropriate contract for the circumstances revealed by the application.

There are some obvious mistakes in the application. The printed application form, which might have been used for a twenty year endowment policy or any other form, contained a question and answer relative to the endowment period; and some confusion arose from this error, even in the final stages of the litigation. The application was for a non-participating policy — a form which the insuring company cannot or never does issue.

In the will which the Supreme Court decided was the effective instrument controlling the payment of benefits under the policy, there was an obvious ambiguity as to the intention of the testator. The will might have had full effect, consistent with the words used, if it had operated only upon policies of insurance other than the one in question in the action; there were such other policies, one of which was payable to the executors of the estate of the insured and another or others payable to his wife. None of the words used in the testament purported to revoke any prior designation under existing policies by explicit reference to a change of beneficiary.

Of course, judges in the common-law provinces, as in Quebec, are constantly engaged in the effort to regulate property and personal rights of individuals in accordance with the law, in spite of the ineptitude of the individuals who claim those rights after having put them in peril. We shall not soon or ever dispense with this, one of the common functions of judges and advocates. But, in all provinces, the common law and legislation relating to life insurance call for clarification of the legal relationships of parties to life insurance contracts, for the purpose of reducing the present confusion of mind among lawyers and laymen and, may I add without disrespect, among judges. Perhaps the decision in the instant case will so impress Canadian lawyers with the need for a new analysis and revision of these principles as to bring about important changes in our law by statutory amendment in Quebec and in other provinces.

There is confusion of ideas of contract law with the law of moveable or personal property among laymen and lawyers

dealing with life insurance. This is illustrated by the common use of such a term as "ownership", with respect to a life insurance policy, by persons engaged in the business and by life insurance counsel, and talk of "vested rights" under the policy. We are much affected in Canada by the practice and habits of the life insurance business in the United States: this subject of "ownership" of life insurance policies is being much discussed in the United States in relation to new forms of life insurance arising from new burdens of inheritance taxes and income tax. Settlements of moveable and immoveable property upon donees, by gifts *inter vivos* or by testamentary dispositions, have become much less important in number and value by reason of the disappearance of large or middle-size inheritable (héritable) estates through succession duty and inheritance taxes. At the same time life insurance contracts are becoming more commonly used to make provision for gifts to surviving relatives which may escape or reduce income tax burdens of the donor, as well as inheritance taxes and succession duty. Considerations of "ownership" of life insurance policies are becoming increasingly important in this connection. Administrative tribunals dealing with tax cases enter the field of judicature for tax purposes. The time has therefore come when the meaning of "ownership" must be defined in terms appropriate to the law of contracts.

Lawyers naturally reject the idea, as well as the terminology, which vests its ownership in any one party to a contract; surely all parties to a contract are its "owners" in any legal concept of that term. But we may not thereby control the fashion or language of laymen and business men. The jargon of the trade will prevail over our prejudices for accurate terminology. In the *Adam* case such ideas induced argument as to what was or was not "within the patrimoine" of the assured. Even if we reject the term "owner" of a life insurance policy, it is still necessary to distinguish accurately the rights of the beneficiary from rights of the person whose life is insured, to "control" the policy before maturity. The right to receive the insurance moneys on maturity of the policy, the right to receive insurance moneys by way of policy loan, the right to receive insurance moneys by way of cash surrender value and to deal with dividends or profits, the right to name or change a beneficiary named in a policy, the right to elect alternative options of settlement, the right to transfer from a parent to a child some or all of his rights under a policy of insurance issued on the life of a minor, when that minor comes of full age, the right to transfer or assign the contract absolutely or conditionally; these are some of the aspects of life insurance

contracts that now require more accurate legislative definition in order to attach such rights to the proper party in each case.

In all the common-law provinces of Canada there is in force a statute, commonly known as the Uniform Life Insurance Act, which was the product of the work of the Commissioners on Uniformity of Legislation, under the auspices of the Canadian Bar Association and the Superintendents of Insurance. It has been in force since 1924 and revised from time to time since that date. It is not correct to suppose or say that that statute has satisfactorily resolved all important questions such as those already mentioned.

For example, the same uncertainty has existed in Ontario as that exposed in the *Adam* case, respecting a gift by a testator in his will such as, "all my estate, both real and personal, including policies of insurance upon my life, I give, devise and bequeath unto . . . . .". The dissenting opinions in the Court of King's Bench and in the Supreme Court of Canada in the *Adam* case rejected the Adam will, finding it ineffectual to change the beneficiary named in the policy. The majority in each court confirmed the change. In Ontario, the cases *In re Wythe* [4] and *In re Hoare* [5] were apparently in conflict with each other on the same question, or had to be distinguished. Then came *In re Gooderham* [6] in which the Court of Appeal followed *In re Hoare.*[5] These two latest cases reject the claim that words similar to those used in the *Adam* case constitute an effective declaration to change beneficiaries under life insurance policies in which a beneficiary had been previously named. The Supreme Court decision in the *Adam* case seems inconsistent with the recent Ontario decisions in this aspect and may affect future common-law cases.

The Uniform Act has had much difficulty in declaring the identity of the contracting party who is to "control" or enforce or exercise the rights of the person insured by a policy, at common law, where the person who applies for the policy and pays the premiums is not the person whose life is insured; there is no *jus tertium* at common law, apart from statute, and so, unlike the law of Quebec, contracts for the benefit of a third party do not make him a party to the contract with power to enforce its terms, unless an enforceable trust is established.[7] This fundamental legal principle has important consequences, making the interpre-

[4] (1926), 59 O.L.R. 546 and (1927), 60 O.L.R. 323.
[5] [1933] O.R. 474.
[6] 12 I.L.R. 283; [1945] O.W.N. 542, 909.
[7] *Vandepitte* v. *Preferred Accident Insurance Co.*, [1933] A.C. 70.

tation of contract rights in Quebec necessarily different than in other provinces. But since, in all provinces, we have to deal with life insurance as a commercial contract on business principles which will give effect to the intentions of the contracting parties wherever they reside, and because in commercial law the Civil Code of Quebec and the Common Law of England are derived from the same early sources of commercial law and practice in Europe and America, lawyers should seek to emphasize the similarities rather than the distinctions between the two systems.

In doing so we will not neglect the warning written by the present Chief Justice of Canada in another case, when he said:

> It will not be necessary to repeat that the Courts ought always to be careful, even when the texts are apparently the same, in accepting as authority for a proposition of law under one system, a judgment rendered under a different system of jurisprudence, ... Even where certain language of the statutes or of the policies might in some respects have appeared to correspond with the language now in use, it had to be interpreted and to be applied according to different conceptions of legal doctrine. [8]

The warning to judges is not less valid for lawyers.

This writer is not qualified to put forward an interpretation of life insurance contracts according to the Quebec Civil Code, but he ventures to invite lawyers of Quebec to examine the following statement of common-law principals to ascertain and declare to what extent they are the same or similar to the principles of Quebec Civil Law. Strangely enough, it seems to this writer that, in the *Adam* case, the judgments of the Quebec judges in favour of the plaintiff's claim, all of which were written in French, are more in accord with the common-law views of the contract of life insurance than are those judgments in favour of the defendant, two of which were written in English. Readers of this note may have a different opinion.

Under the common law, the courts have declared that a policy of life insurance is not "property" before maturity; it is not even a "chose-in-action", to be included in the general field of moveable or personal property.[9] It is a contract depending for its fulfilment on an event which may not happen while the policy is in force. The contract may lapse or be abandoned by the assured. It may become valuable and, like other contracts, its benefits may be transferred or assigned. But, at the maturity of the policy (that is to say, upon the happening of the event on which the insurance moneys become payable) the life insurance

[8] *Hallé* v. *Canadian Indemnity*, [1937] S.C.R. 368.
[9] *Baeder* v. *Canadian Order of Chosen Friends* (1916), 36 O.L.R. 30.

policy changes its character. The contract is then a "chose-in-action"; the rights of all parties therein are crystallized and determined; the insurance moneys are "property", in the hands of the insuring company, belonging to the beneficiary, and the rights to enforce the policy are vested in the proper parties, according to its terms.

Similarly the designation of a beneficiary under a life insurance contract at common law is not a "testamentary disposition"; it is not "a power of appointment"; and it is not a "transfer" or "assignment"; it is not an inheritable privilege, transmitted by succession to personal representatives of a deceased person or to an heir. It can only be described, as it is in our statutes, as a personal right to designate a beneficiary under the contract. The policy and the statutes define, create and regulate it.

Until statutes had provided for change of beneficiary by will, many contracts did not so provide. When the statutes were enacted in common-law jurisdictions to provide for change of beneficiary by will, such designation was made independent of the validity of the will as a testamentary instrument; the change was effective, in relation to other designations, as of the date of execution of the will instead of the date of death. Under such statutory provisions it would seem that the change of beneficiary by will implied by the Supreme Court judgment in the *Adam* case comes too late to affect the prior designation of a beneficiary in a policy which has matured at the instant of the death of the pers on whose life is insured. There is no instant of suspense of legal rights co-incident with death which gives time for a will to operate on a policy of insurance maturing at death, as some of the justices seem to think may be possible according to Quebec law. Someone says, "Le mort saisit le vif": that is a principle of ancient origin, well established. But does it necessarily imply (with or without the aid of article 2591) the priority or dominion of a will over a life insurance policy, which matures coincidently (simultaneously) with the will, *i.e.* upon the death of the testator?

The relationship of the application for the policy to the policy itself, when physically attached to and declared in terms to be a part of the contract, is another matter on which one might expect the common law and the civil law to agree. But it is very doubtful that such agreement could be reached on the principles enunciated by the majority opinions in the Quebec Court of Appeal. At common law, the policy of life insurance contains the provisions of the agreement between the parties and is, as has

been so often said "the law of the parties". Anyone who claims the benefits of that policy by action-at-law invites the determination of his legal rights by the terms of the policy. If the policy does not accord with the application for insurance, the remedy of the claimant is in an action to reform the contract on the ground of mutual mistake, and not otherwise. Thus, when the applicants for insurance in the *Adam* case stipulated for a non-participating policy and received a policy participating in earnings and surplus of the insurer, it could not be pretended that the stipulation in the proposal prevailed over the contract. Yet some of the justices put forward the view that the demand in the proposal respecting reservation of the right to change the beneficiary was the full and only agreement between the applicants in relation to it. Such a submission would be untenable at common law, as also would be the proposition, relied on in the *Adam* case, that some of the terms of the policy, having been stipulated for the protection of the insurer, were not to rule the relationships of the other contracting parties. This writer might even have supposed that the civil law, which makes the beneficiary a party to the contract with a legal right to enforce its terms, would be even stronger than the common law in asserting the proposition that no acts done pursuant to the contract could be *res inter alios acta* for any party; and even more especially so, an act to revoke or extinguish the rights of the beneficiary who had the benefit of article 1029 of the Quebec Civil Code. Was not the right to change the beneficiary "sujet aux restrictions de la loi"? But the foregoing observations come dangerously near re-arguing the question which has been finally decided for Quebec by the Supreme Court of Canada — a vain exercise for an Ontario lawyer.

Assuming that there will be no further appeal, the following rules have now been laid down on the facts of the *Adam* case: (1) a policy of life insurance, in the ordinary form (in which the life insured is the person named as "the assured" in the policy, and in which a third person is named beneficiary to receive the proceeds of the policy upon the death of the assured, and which contains a reservation of the right to change the beneficiary by the act of the assured alone) is recognized as belonging to the estate of the assured during his lifetime (in his patrimoine) and, at the time of his death, it may be disposed of by the assured's last will and testament as effectually as might be done by the assured's act, pursuant to the terms of the policy, within his lifetime.

(2) Even in cases in which the beneficiary named in the policy is also an applicant for the insurance and undertakes to pay the

premiums thereon (unless the policy otherwise provides in express terms), that person acquires only a contingent (precarious) right to benefits under the policy, of which he may be deprived without his consent if the policy contains the usual clause reserving the right to change the beneficiary. Such a clause excludes article 1029 of the Civil Code from any application to the policy.

Does this judgment, so understood, require any actual change in future business practice in dealing with policies of life insurance in common-law provinces as well as in Quebec? One cannot be dogmatic about the future, but this writer thinks it does in the following respects:

(1) Insurance companies and others who have to deal with the disposition of insurance moneys at the maturity of the policy by death of the insured may require proof of the last will and testament of the assured, or proof of his intestacy, before paying over insurance moneys or otherwise dealing with the policy after the death of the insured; at least, in Quebec, this seems to be indicated. It will be necessary to reconsider what was said in another case in the Supreme Court.[10]

(2) A change of beneficiary by the last will and testament of the assured under an ordinary life insurance contract is made in many cases in which heretofore such wills would have had no effect.

(3) There are at present in force a multitude of unmatured policies in which a parent has insured the life of a minor child for the benefit of the parent and has continued to pay the premiums for many years. In some cases the purpose of these insurances is to secure reimbursement for a large investment of moneys in the education and maintenance of the child, which would become a financial loss upon the death of the child before such education and maintenance can produce the rewards which they would naturally earn in adult years. Many of these policies do not carefully nor accurately express the interests of the applicant, and of the person who pays the premiums, in the insurance moneys payable at maturity. This type of policy is as common in Quebec as elsewhere. Such policies have raised doubts and, in some cases, caused disputes when payment of the insurance moneys is made at maturity. Although new policy forms may meet the situation in regard to new insurances (and ought to), many existing Canadian policies will be ruled in favour of the child's right to exclude his parent from the benefits of the contract which the parent bought and paid for.

[10] *National Life Assce. Co.* v. *McCoubrey*, [1926] S.C.R. 277, at p. 281.

The judgment in the *Adam* case makes the interpretation of such policies more certain and less open to dispute: but it is a "certainty" which deprives the parent of his security for moneys advanced in payment of the premiums and of the security for capital invested in the maintenance and education of his child. The pre-existing condition of doubt may have needed legislation to remedy it; the effect of the *Adam* judgment is to make that remedy more imperative, if protection is desired for the contracting parent. It seems to this writer reasonable to suggest that life insurance companies in Canada should review all policies in force which at date of issue insured a minor upon the application of another person, for the benefit of the applicant, to confirm the appropriateness and sufficiency of the policy contract in the present circumstances of the parties, in order that, before maturity of the policy, all necessary changes of beneficiary or other adjustments may be made to meet the present needs of the parties..

This case may perhaps bring into new perspective for lawyers of the common-law provinces the situation in which Quebec finds itself on appeals from Quebec courts to the Supreme Court of Canada, when questions arising on the interpretation of the Quebec Civil Code are to be determined in a court of five judges, of whom only two have practised at the Bar of Quebec. In the *Adam* case, the question came to the Ottawa court at the stage when opinions in the Quebec courts were equally divided in favour of the contending parties. He would be a bold advocate who claimed that the weight of judicial opinion at that stage inclined the scales towards either party. It is also beyond the range of a lawyer's estimation what was the weight, in the Supreme Court decision, of the opinion of judges educated in common-law principles. It is no less speculative to consider what would be the value of a further reference of the questions in the *Adam* case to a decision by the Judicial Committee of the Privy Council in the United Kingdom.

Indeed, the situation of the common-law provinces in the Supreme Court of Canada is only different in degree. In some appeals from provincial common-law courts, the issue is determined by a bench in which only three of the five judges sitting have practised in common-law courts. This case however is less objectionable than the case of Quebec, because all civil-law judges in the Supreme Court are bilingual and not all common-law judges in that court are fully at home in the use of the French language. The situation of our general court of appeal is not beyond fair criticism in this aspect of judicature. Such criticism is of special

importance at a time when the abolition of appeals to the Judicial Committee of the Privy Council must be discussed and decided by Parliament.

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MOTOR VEHICLES—BRAKES HAVING TWO SEPARATE MEANS OF APPLICATION.—The Chief Justice of the Supreme Court of Prince Edward Island has recently delivered a judgment the implications of which may be far reaching. The Prince Edward Island Highway Traffic Act requires, in respect of braking equipment, that every motor vehicle shall be equipped with brakes "having two separate means of application".[1] The same phrase is to be found in the Highway Traffic Act or Motor Vehicle Act of some other provinces, including Ontario, Manitoba and Saskatchewan. The Prince Edward Island act further provides that the brakes shall be "so constructed that no part which is liable to failure shall be common to the two". This phrase is not to be found in the comparable provisions of the Ontario, Manitoba and Saskatchewan acts.

In the case to which reference is made, *Cahill* v. *McNevin*,[2] it appears that the braking mechanism of a motor vehicle became water soaked from the road and then froze in a severe frost while the vehicle was being driven; and the brakes did not work when need arose.

In the result the defendant was found negligent "in not having his vehicle equipped with, and in not using, a *prescribed* alternative braking system". The Chief Justice discussed the case of *Bowen* v. *Wilson*,[3] wherein it was decided that the requirement of "two independent brakes" was satisfied by two brakes, one operated by foot and one by hand, by separate brake blocks on a common brake drum. His Lordship pointed out that the Prince Edward Island act requires not independent brakes but independent modes (means) of application. He held that the modes (means) of application include the friction of brake linings on brake drums and that friction on brake drums, in the case at bar, was thus a common part of the modes (means) of application of both service and emergency brakes. He says that if the failure, through icing or otherwise, of the common parts is liable to incapacitate both sets of brakes from

[1] 1 Edward VIII, 1936, c. 2, s. 23.
[2] (1947), 20 M.P.R. 114.
[3] [1927] 14 K.B. 507.

a common cause, then they do not comply with the requirements of the act.

While undoubtedly the provision in the Prince Edward Island act is more restrictive by reason of the use of the words "so constructed that no part which is liable to failure shall be common to the two", nevertheless the reasoning of the Chief Justice would seem to apply also in the case of statutes containing only the requirement as to "two separate means of application".

Since it would seem that large numbers of motor vehicles on the highways are equipped with service and emergency brakes that both operate on the same brake drums, the decision in this case may be of far reaching importance.

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TORT — COMPENSATION PAID UNDER GOVERNMENT EMPLOYEES COMPENSATION ACT — ACTION BY CROWN AGAINST EMPLOYER OF TORTFEASOR — INDEPENDENT INTERVENING CAUSE.— *His Majesty The King* v. *Canadian Pacific Railway Company* was decided in the Supreme Court of Canada a short while ago and the opinions of all five judges hearing the case are reported in [1947] S.C.R. 185. It is a unique and interesting case.

One Christian, a switchman in the employ of the National Harbours Board, while engaged in the performance of his duties in Vancouver, British Columbia, was injured as the result of the negligence of the servants of the Canadian Pacific Railway Company in leaving a heavy gate ajar and projecting over the Harbour Board's railway. By statute, the National Harbours Board was created a body corporate and declared to be the agent of His Majesty in right of the Dominion of Canada.

The Government Employees Compensation Act (R.S.C., 1927, chapter 30) applies to the employees of the Board and by this act an employee who is caused personal injury by accident arising out of and in the course of his employment is entitled to receive compensation at the same rate as is provided for an employee of a person other than His Majesty under the law of the province in which the accident occurred for determining compensation in cases of employees other than of His Majesty. Christian was awarded by the British Columbia Workmen's Compensation Board the sum of $959.76 for lost time, $523.50 for medical aid and, for partial permanent disability, a lump sum

of $150.00 and $49.98 a month for life. Under the procedure adopted by the Compensation Board and the Dominion Government, money is left on hand with the Compensation Board and it was out of this sum that the payments to Christian were made.

Different actions might have been commenced against the Canadian Pacific Railway Company as a result of the accident.

In the first place, Christian might have proceeded against the Company in a negligence action and, on the facts, no doubt would have succeeded on the ground that his injury was the direct result of the negligence of the employees of the Railway Company. He elected, however, to take compensation and did not bring action against the Company.

The National Harbours Board might have sued under the provisions of the British Columbia Workmen's Compensation Act as an employer whose employee had been injured through the negligence of a third party. If it had, then no doubt the question of the jurisdiction of the Exchequer Court to hear the action would have been raised. The respondent in any event would have had a complete defence on the ground that the collateral provisions of the Workmen's Compensation Act, such as the right of subrogation, do not apply to the Dominion and that the Compensation Board was acting not under the provincial act, but as the administrator of the Dominion act.[1] The two-year period within which a subrogation action must be brought had, moreover, expired and the action was not based on this right of subrogation.

The National Harbours Board might also have brought an action *per quod servitium amisit*. The basis of such an action, however, is the incapacity of the servant to perform his services for his employer and the consequent loss of services to the employer, not the injury to the servant. The amount of damages which could have been recovered would have to be assessed upon the value of the lost services to the master. Loss of services was not pleaded and the case was not fought on this basis. At the date of the trial Christian was employed by the Board in another capacity and no evidence was put forward as to the extent to which the Board lost his services. It is apparent from the judgments of two members of the court who discussed this point that such an action would not have been successful in the circumstances of this case.

The National Harbours Board brought this action at common law against the Canadian Pacific Railway Company to recover

[1] *Ching* v. *C.P.R.*, [1943] S.C.R. 451.

as damages the amount of the award made by the Compensation Board. A claim was made for the exact amount of the award, with the exception that the pension of $49.98 for life was capitalized at the sum of $12,218.11.

The plaintiff relied chiefly on the cases of *Re Polemis*,[2] *Hay (or Bourhill)* v. *Young*[3] and *M'Alister* v. *Stevenson*[4] and the concept that "in considering whether a person owes another a duty, a breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man". The plaintiff contended that the payment of the award was not discretionary but obligatory, having been imposed by the Government Employees Compensation Act, and, because this statute was in force at the time of the accident, payments made under it should have been contemplated by the defendant as a natural and probable consequence of any negligence.

The trial judge found that the liability of the Crown (Dominion) to pay the compensation arose from an independent intervening cause, namely a statute of the Dominion Parliament, which lay wholly outside the common law of the Province, and that the damages were not the proximate and direct result of the negligence.

The plaintiff appealed on the basis that such an action did arise at common law; that the Government Employees Compensation Act was not an independent intervening cause; and that the damage claimed was the proximate and direct result of the negligence of the Railway Company's employees. The appellant argued that an independent intervening cause should be confined to voluntary acts arising after the accident and contributing to the damage. The appellant agreed with the trial judge that such an intervening act might be found in *The Amerika*,[5] which was relied on by him because in that case the payment of the pension was purely voluntary and in the discretion of the Admiralty. It was further contended that such an intervening act might be found in the acts of third persons. The appellant argued, however, that in the present case the payment of the award was not discretionary but obligatory under the statute and that, as the statute was in force at the time the cause of action arose, it could not be regarded as intervening at all but rather as a condition upon which the negligence of the defendant operated. It was submitted that

[2] [1921] 3 K.B. 560.
[3] [1943] A.C. 92.
[4] [1932] A.C. 562.
[5] [1917] A.C. 38.

the test of the damage is "what are the natural and probable consequences of the negligence found" (*Re Polemis*, etc.) and that the payment of the award was a natural and probable consequence.

The respondent, on the other hand, contended that the liability of the Crown to pay the compensation did arise from an independent intervening cause, namely, a statute of the Dominion Parliament. The respondent put forward as another argument that the appellant could not assert a right under the common law of British Columbia and at the same time by its own legislation determine what the measure of damages was to be, because such legislation would be a direct invasion of the exclusive jurisdiction of the Province over civil rights. It submitted that the compensation payable under the Dominion act was not the direct result of the tortious act of the respondent's servants. The Dominion act does not contain any provision to the effect that a person who injures a Crown servant is to be civilly liable for the compensation payable by the Dominion and such a provision would in any event be unconstitutional. The respondent agreed that the Dominion Government could provide for the payment of compensation to an employee who is injured in the course of his employment, but for the Dominion to provide by legislation for the recovery of such an amount from the person negligently causing the injury is disregarding the limitations placed on the power of the Dominion Government to legislate on civil rights.

The appeal was dismissed for the reasons that no cause of action was found and compensation considered as damages was too remote a consequence of the negligence. Mr. Justice Kerwin found that the appellant's loss arose from "a separate and concurrent cause, extraneous to and distinct in character from the tort". Mr. Justice Taschereau held that the accident was "the *causa sine qua non* but was not the *causa causans* of the damages which the plaintiff now seeks to recover". He sets out that "when some new factor intervenes which is unconnected with the original culpable act or default, liability ceases" and he found that "the loss sustained by the appellants is attributable to an independent cause, intervening between the tortious act and its logical consequences". Mr. Justice Rand decided that the "payments have not, in a legal sense, been caused by the wrong against the servant; the wrong is the occasion of their being made; the cause is the contract".

The appellant was unable to cite any authorities in which compensation including a capitalized pension was allowed as

damages in a negligence action against a third party but endeavoured to apply the principle of law as established in *Hay* (*Bourhill*) v. *Young* (*supra*) and to extend the basis of liability set out in that line of cases. There were, however, dicta to the contrary in several leading cases including *The Amerika*. All members of the court chose to follow these dicta and refused to extend the liability.

There are certain significant statements in the judgments. Mr. Justice Rand quotes Coleridge J. in *Lumley* v. *Gye*, "Courts of Justice should not allow themselves in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds, which our law, in a wise consciousness as I conceive of its limited powers, has imposed on itself of redressing only the proximate and direct consequences of wrongful acts", and concludes his judgment with the words, "Liability is necessary for the essential standards of social conduct, but any enlargement of the field which in general rule our legal experience has mapped out should come from the Legislature and not the Courts".

There can be no doubt of the Crown's right to recover for any damage that might have been caused to its engine by the gate in question, in that a reasonable man in the position of the switching crew of the respondent Railway Company would have foreseen that allowing the gate to extend on to the Harbour Board's Railway would cause damage to the defendant's equipment. If damage to the engine could have been foreseen, then, equally, injury to the employees of the Crown could have been foreseen, because all parties concerned in the action knew that it was the duty of the switchman to ride at the front of the engine. If the appellant's argument is carried to its logical conclusion the amount of compensation paid might well have been found to be damages which were the natural and probable consequences of the negligence. For the Crown to have a cause of action against the Railway Company, privity is not necessary.[6] The Crown is claiming relief over from an obligation placed upon it without fault on the part of the Crown, but the common law, built generally on the proposition that there should be no liability without fault, has had superimposed upon it a statutory liability without fault. The question arose whether the courts would devise a remedy over against the wrongdoer whose action brought the statute into operation and who was, therefore, immediately responsible for the obligation having arisen. The facts fell outside any binding authority and the court had the problem either

[6] *M'Alister* v. *Stevenson*, [1932] A.C. 562.

of declaring for or against a new cause of action. While there is no judgment covering the particular issue in this case, there are nevertheless certain principles that might have been applied to give the Crown a cause of action. The court was in a position where it was asked to declare the law and it exercised its choice against allowing a remedy. In finding that the compensation was too remote a consequence of the respondent's negligence it refused to allow itself to pursue "a perfectly complete remedy for all wrongful acts" and to redress other than proximate and direct consequences. The authorities do not preclude the Privy Council reversing the finding and allowing a remedy, for, although they do not expressly include a remedy, neither do they exclude it. At any rate, unless the Privy Council reverses the decision at some future time, any enlargement of the field along these lines must come from the legislature, as suggested by Mr. Justice Rand.

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CIVIL LIBERTIES — THEATRE REFUSING TO ADMIT NEGRO PERSON TO ORCHESTRA SEAT — VIOLATION OF TAX LAW — SUMMARY CONVICTION — CERTIORARI — ABUSE OF LEGAL PROCESS. — *Rex* v. *Desmond*[1] is one of the most interesting decisions to come from a Nova Scotia court in many years in the sphere of what is too often and too loosely referred to as "civil liberties". The questions posed by the case are difficult to state in legal terms since the problem is really one of discrimination against a negro by a theatre manager who has apparently violated no law of human rights and fundamental freedoms in this free country in refusing admission to part of his theatre to persons of negro extraction.[2] But if the law allows the manager this right to run

[1] Not yet reported. (July 18th 1947). Decided on May 17th, 1947, by the Supreme Court of Nova Scotia *in banco*: Carroll, Doull, Graham and Hall JJ., on appeal from Archibald J.

[2] The ancient obligation imposed by the Common Law on innkeepers to take in all comers regardless of colour, etc., could not reasonably be extended to operators of places of amusement. Even restaurants have been excluded: *Franklin* v. *Evans* (1924), 55 O.L.R. 349. Nor are licensees of quasi-monopolies, such as beer and wine vendors, required to serve the public without discrimination: *Christie* v. *York Corp.*, [1940] 1 D.L.R. 81 (a Quebec case decided by the Supreme Court of Canada: see comment (1940), 18 Can. Bar Rev. 314) and *Rogers* v. *Clarence Hotel Co. Ltd.*, [1940] 3 D.L.R. 583 (a British Columbia Court of Appeal decision: see comment (1940), 18 Can. Bar Rev. 730). The dissenting opinions in each case display a more desirable attitude to the social development of the law. For a Quebec decision relating directly to exclusion of a negro from a particular part of a theatre, see *Loew's Montreal Theatres Ltd.* v. *Reynolds* (1919), 30 K.B. 459, where Martin J. said (at pp. 465-66): "A theatre is a place of amusement, operated

his business as he pleases, can the manager properly do anything about it, beyond using the necessary force to remove the negro person if she enters without his permission? In this case the manager not only removed the negro person, as our democratic law says he may, but he also charged her with the violation of a quasi-criminal provision in a provincial statute which requires the patrons of theatres to pay a small tax. The prosecution succeeded and the patron was convicted and fined the minimum penalty of $20 and costs for failing to pay one cent in tax. The negro patron applied to the Supreme Court of Nova Scotia for a writ of *certiorari* to quash the conviction. The Supreme Court *in banco* refused the application. It is the purpose of this note to review the facts of the case in detail, and to consider whether the court was obliged to reach, on technical grounds, a decision apparently distasteful to the court on other grounds.

On November 8th, 1946, Mrs. Desmond, a person of negro extraction, decided to visit a theatre in the town of New Glasgow, N.S. She was sold a ticket "for the upstairs", price, thirty cents. She presented her ticket to an attendant who told her she would have to go upstairs. She then "went back to the cashier, offered to pay the difference in price between the tickets . . . came back and passed into the theatre . . . [and] seated herself downstairs". She refused to move upstairs when requested by the manager. He had her removed by an officer. Mrs. Desmond was then arrested and an information was laid by the manager, who was represented by counsel, charging that she "did enter a theatre at New Glasgow, N.S. . . . the same being a place where a tax is imposed by the Theatres, Cinematographs and Amusements Act[3] without paying the said tax".

It is understood that Mrs. Desmond was not sold an orchestra ticket because she is a negro. The theatre management evidently follows a policy of segregation by seating negro persons in the balcony only. The price of the balcony seat is thirty cents, of which two cents is provincial tax collected on behalf of the pro-

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under private management as a strictly commercial enterprise. It is true it is licensed by public authority and specially taxed, but it is not under the same legal obligations as an hotel or a common carrier; . . .While it may be unlawful to exclude persons of colour from the equal enjoyment of all rights and privileges in all places of public amusement, the management has the right to assign particular seats to different races and classes of men and women as it sees fit . . ." The able dissenting judgment of O'Halloran J. A. in *Rogers* v. *Clarence Hotel Co. Ltd.* (*supra*) would suggest that Martin J. was not necessarily correct, but it is doubtful whether a Nova Scotia court would depart from the majority judgments, particularly of the Supreme Court of Canada.

[3] R.S.N.S., 1923, c. 162, as amended 1934 N.S., c. 39.

vince by the management. The price of an orchestra seat is forty cents, of which three cents is provincial tax.

Mrs. Desmond was placed in gaol overnight and the next morning appeared before the magistrate. Her entire recorded testimony is short and to the point. She said:

> I am the accused. I offered to pay the difference in the price between the tickets. They would not accept it.

She was not represented by counsel and evidently attempted no cross-examination. If the magistrate offered her any assistance, or in any way explained her position to her, he did not consider it worthwhile to enter his remarks on the record. His entire comment seems to have been:

> I find the accused guilty of the charge in the Information.
> I impose a penalty of $20.00 and costs of $2.50, Magistrate, and $3.50 Police, total $26.00, payable forthwith, or, in default, one Month in gaol.

Under the Theatres, Cinematographs and Amusements Act, the penalties prescribed shall be enforced under the Summary Convictions Act. Under this act Mrs. Desmond had a right of appeal provided she gave due notice within ten days after her conviction. Although she consulted counsel in Halifax, N.S., about four days later, notice of appeal was not filed. Instead, on December 30th, 1946, Mrs. Desmond, through her counsel, gave notice of an application to be made on January 10th, 1947, for a writ of *certiorari* on the following grounds (a third ground was later dropped):

> (1) that there was no evidence to support the aforesaid conviction;
> (2) that there is evidence to show that the aforesaid Viola Irene Desmond did not commit the offence hereinbefore recited;

Archibald J. dismissed the application and the applicant appealed. The full court dismissed the appeal on three grounds. First, since the magistrate had jurisdiction, and his conviction is good on its face and regular in form, the court applied the *Nat Bell*[4] decision and refused to look at the evidence. Secondly, it was argued that there had been a "denial of natural justice" in the magistrate's court, and reliance was placed on *Rex* v. *Wandsworth Justices, ex parte Read.*[5] The court found no "denial of natural justice" in the facts of this case and refused to follow the *Wandsworth Justices* case. Thirdly, Graham J., at least, agreed with the view taken by Archibald J. below that the remedy

[4] *Rex* v. *Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128.
[5] [1942] 1 All E.R. 56.

of *certiorari* was not open when there existed a right of appeal of which the applicant failed to take advantage.

These grounds, which are considered briefly below, all relate to procedural niceties, on the assumption that this was a *bona fide* prosecution, but I hope to show, later, that there is a further *legal* question: Should the prosecution have been instituted in the first place?

Counsel for Mrs. Desmond contended that s. 8 of the Liberty of the Subject Act[6] as amended[7] applied in any application for a writ of *certiorari*. The section permits the court to direct production of the "evidence, depositions, convictions, and all proceedings . . . to the end that the same may be viewed and considered by the court or judge, and to the end that the sufficiency thereof to warrant such confinement or restraint may be determined".

The court held, in the present case, that only one in "confinement or restraint" at the time of the application may take advantage of the section, but even if the provision did apply here, the full court has already held that it does not empower the court or a judge to review the evidence beyond what is necessary to see whether there has been *any* evidence before the magistrate.[8]

Assuming that the court could, notwithstanding the *Nat Bell* decision, have examined the evidence in the magistrate's court, what conclusions might they have reached? It is submitted with great respect that Mrs. Desmond would remain convicted, although Carroll and Hall JJ. evidently considered the conviction against the weight of evidence. It might have been said that since Mrs. Desmond purchased a ticket for a balcony seat, she had paid the tax imposed by the act on anyone entering a theatre. But s. 8 (8) provides that:

> No person shall, where the tax imposed by this Chapter is payable by him
>
> (a) enter a theatre; . . .
>
> unless and until such person has paid the said tax, and where the tax is to be collected by means of tickets, has deposited in the said receptacle a ticket representing the amount of said tax.

[6] R.S.N.S., 1923, c. 231.

[7] 1925 N.S., c. 74.

[8] *Re McDonald* (1936), 11 M.P.R. 91. The Supreme Court *in banco* said, at p. 94: "Upon its face it [s. 8] permits the Court to consider the evidence. In doing so the Court will not weigh the evidence, if there is any, because that would turn the application into an appeal; but if it finds no evidence at all, it may properly release the prisoner." This would apparently overrule the more literal view expressed by Carroll J. in *Re Hillman* (1926), 46 C.C.C. 308, at p. 310: " . . . a Court or a Judge has not only the right to review the proceedings in order to ascertain whether there is *any evidence*, but also to review the *evidence* to determine the *sufficiency* thereof."

Entering a theatre, as the words are used in the act, obviously does not mean entering any part including the public lobby of a theatre. There are two material parts of a theatre, the balcony, with an entry tax (in this instance) of two cents, and the orchestra, with an entry tax of three cents. Mrs. Desmond paid the entry tax for the balcony; she entered the orchestra, and at the best she is in default one cent, if not three, for she paid nothing and made no contract to enter the orchestra, and so may be in default the entire amount of that tax.

On the second ground, that there was no denial of natural justice in the magistrate's court, reliance was placed by counsel, not on the factual basis of the *Wandsworth Justices* case, but on a statement of general principle, to use the words of Humphreys J. in that case:

> In my judgment, if a person can satisfy this court that he has been convicted of a criminal offence as the result of a complete disregard by the tribunal of the laws of natural justice, he is entitled to the protection of this court.[9]

One is compelled to agree without reserve to a comment on this language in the able judgment of Doull J., who says:

> the words 'natural justice' were used in some of the opinions of the judges but I doubt whether that is a good term.

In fact, any one of three separate things, or a combination of any two, or of all three, may have been the denial of "natural justice" referred to by the court in that case: the denial of the right to be heard, the denial of the right to cross-examine and the failure of the Crown to discharge the burden of proof. But none of these things is present in the *Desmond* case, and English law knows no "natural justice" as such. For this euphemism must be substituted some concrete, legal right which has been denied or violated. None was found by the court in the facts of this case.

On the question whether, where there is a right of appeal, *certiorari* should issue, Doull J. and Graham J. appear to differ. The Nova Scotia practice seems to be fairly authoritatively discussed by Graham E. J. in *re Ruggles*.[10] If there were a want of jurisdiction a right to appeal would probably not bar the writ.

Although Mrs. Desmond's conviction may have been technically perfect, and the only complaint in the situation one of policy as to the exclusion of negroes from theatres, one further and important point remains to be discussed, although it does not

[9] [1942] 1 All E.R. 56, at p. 58.
[10] (1902), 35 N.S.R. 57; 5 C.C.C. 163.

appear to have been argued in the case. It is suggested by a pointed remark made by Hall J. in his short judgment. He said:

> One wonders if the Manager of the Theatre who laid the complaint was so zealous because of a bona fide belief that there had been an attempt to defraud the Province of Nova Scotia of the sum of one cent, or was it a surreptitious endeavour to enforce a Jim Crow rule by misuse of a Public Statute.

The temptation to agree with this view is well nigh irresistible. If Hall J. is right in his wondering, however, and there was a misuse of a public statute, one might "wonder" further whether the misuse might not of itself constitute a denial of justice when the magistrate fails to correct the misuse? It is not the purpose of any court to convict an accused person in any event. The function of the court is to administer justice under the law. If there appears before a magistrate a person who is being prosecuted for improper reasons by misuse of a statute, it is surely the magistrate's duty to explore that misuse. The magistrate has no jurisdiction until an informant lays an information and, if a private informant misuses a statute and improperly lays an information, then is the magistrate acting without jurisdiction?

What is a misuse of a public statute? Few enforcement officers of the province would be foolish enough to prosecute many persons, white or negro, for failure to pay a tax of one cent, particularly when the evidence shows that the persons tendered the tax and the tax collector refused to take it. But the act does not leave the enforcement to the provincial law officers. It does provide expressly that enforcement shall be the duty of every peace officer, but that is not exclusive. Apparently any citizen can take it upon himself to initiate a prosecution by laying an information. Does that unfortunate failure of the legislature to restrict prosecutions to those brought with the consent of the Crown mean that a man who uses the act to prosecute for his own reasons is misusing the act? Whatever Hall J. may have meant, it would not appear that he considered this misuse to have any legal significance. Perhaps, however, I might be forgiven if I add a brief footnote to the judgment of Hall J., consisting of quotations from four Canadian cases.[11] The first is *The King* v. *Michigan Central Railroad Company*, where Riddell J. said:

> But in any case I could not use the criminal law or allow it to be used as a lever to enforce the payment of civil claims for damages. Anyone who puts the criminal law in force for the purpose of bringing about the settlement of a civil claim is guilty, *in law and in conscience*, of a wrong . . .[12]

[11] The principle recognized in the following decisions is the basis of a civil cause of action in English law: *Grainger* v. *Hill* (1838), 132 E.R. 769.
[12] (1907), 17 C.C.C. 483, at p. 495 (Ontario) (italics mine).

and Macdonald C. J. A. in *Rex* v. *Thornton:*

> This prosecution has the ear-marks of an attempt to use the process of the Criminal Courts for the collection of a debt, *or for the punishment of a defaulting debtor* . . . In these circumstances, the prosecution should never have been commenced.
>
> The Conviction should be set aside.[13]

Grant J. A., speaking for the court in *Rex* v. *Leroux*, said:

> In effect, the complainant, by threatening prosecution, endeavoured to obtain payment of a debt. What was done in this case amounted to an abuse of the process of the Court and should not be tolerated . . . The criminal law was not enacted for the assistance of persons seeking to collect civil debts.[14]

Finally, Macdonald C. J. A., again, in *Rex* v. *Bell* said:

> Now while we think the evidence in the circumstances was not such as could be safely acted upon to found a conviction we wish to say in addition that it is apparent to us that the criminal proceedings *were manifestly not taken in vindication of public justice* but wholly because of appellant's refusal to comply with the demand to "dig up the money or take the consequences". The prosecution, was, therefore, an abuse of the process of the magistrate's Court which we cannot countenance. We think that the criminal courts are not to be held *in terrorem* over alleged debtors.[15]

In this case is to be found the first dissenting voice to this view of the law. Martin J. A., dissenting, said:

> And in Wells v. Abrahams (1872), L.R. 7 Q.B. 554 at p. 563, Lush, J., said that: — 'It is the duty of the person who is the victim of a felonious act on the part of another to prosecute for the felony, and he cannot obtain redress by civil action until he has satisfied that requirement.' How can this fundamental 'requirement' of public justice be 'satisfied' if the present charge, under a statute passed specially to enforce the principles of common honesty in business, be dismissed from our criminal courts as an abuse thereof?[16]

In *Rex* v. *Desmond,* on the facts, the manager was obviously not trying to collect a "civil debt", but it is equally obvious that his motive was not the "vindication of public justice", nor an attempt to help the province collect one cent in taxes, nor was

[13] (1926), 46 C.C.C. 249, at p. 255-56 (British Columbia) (italics mine). This was a case on appeal and there was another substantial ground for allowing the appeal.

[14] (1928), 50 C.C.C. 52, at p. 56-7 (Ontario). It was also held that the charge was brought under the wrong section of the Code. In quashing the conviction, Grant J. A. said: "It will be for the Crown to say whether or not a new charge shall be laid under s. 406". Not, apparently, for any private prosecutor to say.

[15] (1929), 51 C.C.C. 388, at p. 391-92 (British Columbia) (italics mine).

[16] *Ibid.* at p. 403.

he "the victim of a felonious act", but rather he is attempting to punish trespassers or to enforce what Hall J. shrewdly suspects is his desire to discriminate between negro and white patrons of his theatre. These are all cases of convictions quashed on appeal on jurisdictional grounds *inter alia* and, in fact, the magistrate in this case might have himself refused to try the case, if the opinion of the Privy Council in *Haggard* v. *Pelicier Frères*[17] could be made to apply to a criminal charge, which is perhaps open to doubt. Lord Watson said in that case:

> Their Lordships hold it to be settled that a Court of competent jurisdiction has inherent power to prevent abuse of its process, by staying or dismissing, *without proof*, actions which it holds to be vexatious.[18]

Could it be said that *Rex* v. *Desmond* was a vexatious action?

No comment on this case would be complete without an attempt to analyse the social issues involved, and without some constructive suggestion to avoid a recurrence of this particular situation.

Doubtless Lord Hewart, skeptical as he was of the "new despotism", would be mightily pleased with this case, as it represents the "rule of law" in action. But many people, and, to do him justice, probably Lord Hewart himself, would be more satisfied if some ministerial discretion had been exercised here to prevent the prosecution. It is submitted, with due deference, that the legislature would be well advised to amend the act to provide that no prosecution be commenced for any alleged offence under it without the consent in writing of the Attorney-General of the province. The act is, after all, not merely a taxing act, but a primitive form of modern control legislation and, in view of this and the fact that the penalty provided for an offence is "not less than twenty dollars", it is perhaps only reasonable that the enforcement administration should be under the control of the government.

It should be observed that in this case the real breach of "civil liberties", the discrimination against colour, took place outside the sphere of legal rules. I do not suggest that provincial control of prosecution will result in any change in this respect. English rules of law respecting "liberty" and "equality" are largely negative in character and depend to a great extent on social customs and traditions of uncertain permanence. Even in the United States of America, where the citizens enjoy a home-

[17] [1892] A.C. 61.
[18] *Ibid.*, at pp. 67-8 (italics mine).

grown bill of rights, racial discrimination is scarcely unknown.[19] And it is unlikely that any general bill of rights would provide for the present case where private rights of the manager would be invaded.[20] Of course, no amount of government by the rule of law will prevent such discrimination. We have to realize that "law" alone cannot make us democratic. On the other hand, the law need not facilitate racial prejudice by uncontrolled private prosecutions and while Nova Scotia can doubtless use the $19.99 profit on the prosecution, and those inhabitants of New Glasgow who disapprove of negroes sitting in orchestra seats will doubtless continue to disapprove, yet it may be counted as a step forward if one potential weakness of the law be removed.

What so many students of civil liberties so often overlook is that our most cherished liberties are largely social and traditional in their origin and English common law does not and could not provide very extensive guarantees of their continuance. For one thing, access to the courts, one of our most talked of rights, is to say the least an expensive one for most income groups. It is submitted that two necessary courses of action are open: constantly publicizing the traditions of equality in our cultural heritage and providing optimum equality of economic conditions so that there will be a minimum conflict between social ideals and economic reality.[21] Let us not overlook the importance of constant vigilance as to the state of our law (as I have recommended one minute but concrete correction — the state of the law is but the summation of many such detailed rules) but let us not overlook the fact that the great guarantees of freedom and human rights are to be found also at non-legal levels. And let no man suppose that our present traditions are perfect, or intel-

[19] For an account of a recent example of extreme racialism in the United States of America, see the brilliant article by Miss Rebecca West in The New Yorker, June 14th, 1947, at p. 31. This article is recommended reading for every student of "civil liberties".

[20] Of course an obvious amendment for the Theatres, etc., Act would be to require licensees to receive all comers on an equal footing. While it would invade the private rights of the licensee, he has a virtual monopoly that should be paid for by such a price. (See note (2) *supra*) However, to judge from the present situation, such an amendment would not be welcomed politically in Nova Scotia today. The factual basis of the whole problem of discrimination ought to be thoroughly investigated by the provincial government.

[21] The responsibility for the state's part in maintaining our fundamental freedoms would seem to rest equally with the Attorney General's Department and the Department of Education. For an example of anti-discrimination legislation see The Racial Discrimination Act, 1944 Ontario, 8 Geo. VI, c. 51. Alberta and Saskatchewan have attempted a general bill of rights statute: The Alberta Bill of Rights Act, 1946 Alta., c. 11 (the Saskatchewan legislation (1947) is not yet available). It is unlikely that any of these acts would have helped in the present situation.

ligently understood by all, as the present case so well illustrates. These traditions require constant study and analysis, so that the very traditions that half a century ago fostered our freedom will not hinder it today.

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THE LIFE OF THE LAW

And so it is to be understood, that in divers lordships, and in divers mannors, there be many and divers customes in such cases, as to take tenements, and as to plead, and as to other things and customes to be done; and whatsoever is not against reason may well be admitted and allowed.

'There be many and divers customes'. This was cautiously set downe, for in respect of the variety of the customes in most mannors, it is not possible to set down any certainty, only this incident inseparable every custome must have, viz. that it be consonant to reason; for how long soever it hath continued, if it be against reason, it is of no force in law.

'Against reason'. This is not to be understood of every unlearned man's reason, but of artificiall and legal reason warranted by authority of law: *Lex est summa ratio.*

* * *

'And against reason'. And this is another strong argument in law, *Nihil quod est contra rationem est licitum;* for reason is the life of the law, nay the common law itself is nothing else but reason, which is to be understood of an artificiall perfection of reason, gotten by long study, observation, and experience, and not of every man's naturall reason; for, *nemo nascitur artifex.* This legall reason *est summa ratio.* And therefore if all the reason that is dispersed into so many severall heads, were united into one, yet could he not make such a law as the law in *England* is; because by many successions of ages it hath beene fined and refined by an infinite number of grave and learned men, and by long experience growne to such a perfection, for the government of this realme, as the old rule may be justly verified of it, *Neminem oportet esse sapientiorum legibus:* no man out of his own private reason ought to be wiser than the law, which is the perfection of reason. (Edward Coke: Institutes of the Laws of England, or a Commentary upon Littleton. Sections 80 and 138)