CASE AND COMMENT

REQUISITIONING POWERS OVER LAND — DELEGATION OF POWERS—*Blackpool Corporation* v. *Locker*.—Regulation 51 of the Defence (General) Regulations, 1939, made pursuant to the powers conferred by the Emergency Powers Acts, provides by paragraph (1) that a competent authority may, if it appears to that authority to be necessary or expedient so to do, take possession of any land (including, of course, houses) and may give such directions as appear to the competent authority to be necessary or expedient in connection with the taking of possession of that land. It further provides, by paragraph (5), that a competent authority may, to such extent and subject to such restrictions as it thinks proper, delegate all or any of its functions under the first three paragraphs of the Regulation to any specified persons or class of persons.

On the expiration of the Emergency Powers Acts, Regulation 51 was continued in force by an Order in Council (No. 1616 of 1945) made pursuant to the power conferred by section 1 of the Supplies and Services (Transitional Powers) Act, 1945.

The expression "competent authority" is not defined either by the statutes or the Regulations, except that Regulation 100, which purports to define it, refers back to the list of Ministers in Regulation 49, which Regulation had been kept in force by the same statute of 1945 and which Regulation puts the Minister of Health into the list of "competent authorities". Consequently the Minister of Health had by virtue of Regulation 51(5) power to delegate his powers under Regulation 51. In England the Ministry of Health works in very close association with the various Local Authorities and any delegation of the Minister's powers under Regulation 51 would most properly be made in favour of the appropriate Local Authorities.

From the beginning of 1940 the Ministry of Health sent to Local Authorities various circulars delegating (subject to certain conditions) to the clerks of Local Authorities all necessary powers under Regulation 51. Circular No. 2845 of August 1943 was issued to deal with the cases of families inadequately housed. Powers already delegated remained unaffected but they were extended subject to the conditions set out in the appendix to this circular. The appendix was divided into two parts, only the first part, reading as follows, being relevant to the present case:

1. The requisitioning power is limited to the taking possession of: (a) unoccupied houses or other residential buildings whether furnished or not; (b) unoccupied non-residential buildings. 2. The prior consent of the senior regional officer of the Ministry of Health shall be obtained. 3. No chattels contained in any house of which possession is taken may be requisitioned, and the requisition notice shall contain a direction to the owner or tenant requiring him to remove the chattels or to store them in a designated part of the premises specifically excluded from the requisition and informing him that, if he fails to do so, the chattels will be removed and stored by the requisitioning authority. 4. No premises may be requisitioned if arrangements have been made for their use by, or on behalf of, any government department whether by way of requisition or otherwise, or if they are in the occupation of any local authority. 5. The requisition is subject to the right of the Minister at any time to direct the authority to hand over the premises to the person otherwise entitled to possession.

Paragraph 3 of circular No. 138 issued in July 1945 referred to the powers and conditions of circular No. 2845, *viz.* (a) that the prior approval of the senior regional officer was obtained; and (b) that reasonable opportunity was given to the owner or tenant to let or occupy the house, and then went on to state:

> These conditions have in some districts led to difficulty and delay in bringing unoccupied houses into occupation to the fullest possible advantage. In view of the present and increasing urgency of the housing need, the Minister has decided to vary these conditions so as to simplify and expedite procedure, and to authorise clerks of local authorities during the period up to Dec. 31, 1945, to requisition unoccupied houses for the inadequately housed, *subject to the conditions that after the requisitioning of the house but before it is actually brought into occupation* — (1) notice that the house has been requisitioned shall be posted on the premises in every case and also sent to the owner or agent through the post if his name and address are known to the authorities, (2) the house shall not be brought into occupation until fourteen days after this action had been taken, and (3) where within this period the owner notifies his intention to occupy the house by himself or his family the authority shall not proceed further; consideration should *also* be given on their merits to other proposals for the occupation of the house submitted by the owner within this period. Where action by the authority has been suspended on an intimation that the owner or his family intend to re-occupy the house or where the authority has agreed to some other proposal by the owner, they should take steps within a reasonable period, say three weeks, to ensure that the owner has in fact carried out his intention and should report to the senior regional officer of the Ministry of Health any cases in which this has not been done.

Circular No. 5 issued in January 1946 extended the delegation period for six months — from December 31st, 1945, to June 30th, 1946, whilst Circular No. 141 issued in June 1946 further extended the period to December 31st, 1946, and added a new condition which it is unnecessary to consider.

How did these circulars affect Mr. Locker, the defendant in this, to use the words of Lord Justice Scott, "almost incredible case "of *Blackpool Corporation* v. *Locker*?[1] Mr Locker was the freeholder of a property, No. 131, Squires Gate Lane, Blackpool, in the County of Lancaster, and he was also the leaseholder of a house in the County of Cheshire. Unfortunately for him, the damp climate of Cheshire aggravated the chest trouble from which he suffered, with the result that he decided to give up living in Cheshire and to live at Blackpool. His house at Squires Gate Lane, Blackpool, however, was too large for him, so he made up his mind to sell that house and buy a smaller one. A local estate agent found a willing buyer, who agreed to buy "subject to written contract" and who paid the usual 10% deposit. On June 20th, 1946, the house at Squires Gate Lane was temporarily unoccupied, a fact that led to all the subsequent trouble, for these reasons.

On June 20th, 1946, the town clerk of the Blackpool Corporation caused a notice to be served on Mr. Locker or his agent and another notice to be affixed to the door of Mr. Locker's house at Squires Gate Lane, and he demanded the keys of the house from Mr. Locker's agent under threat of putting a new lock on the door. The keys were delivered to the town clerk in the course of the following day, but on June 20th Mr. Locker's solicitor had written to the town clerk's department informing him of the name of the owner of the property and of the contract for sale with vacant possession, and asking for sympathetic treatment on the ground that, if the sale were completed, the house would be occupied. On June 21st, the purchaser of the property called off his sale because of the requisition, and on June 22nd Mr. Locker's solicitor had a conversation over the telephone with the town clerk's department, from which he gathered that his client had fourteen days within which he might elect himself to occupy the house, and that this fourteen days' condition was in a "circular", but he was not offered inspection of any circular. On the same day, that is the 22nd, Mr. Locker's solicitor wrote to the senior regional officer of the Ministry of Health at Manchester asking for "a copy of the circular in order to advise my client", but this letter was not replied to before the 26th June, on which date a regional officer at Manchester wrote to Mr. Locker's solicitor that he is "directed by the Minister of Health" to reply "that the circular cannot be made available to the public".

[1] [1948] 1 K.B. 349; [1948] 1 All E.R. 85.

On June 27th Mr. Locker's solicitor wrote to the town clerk that his "client has gone into possession of the premises, to use the same for the purpose of his own residence", and he asked for the return of the keys, which, as already stated, the town clerk had obtained from Mr. Locker's agent on June 21st. The reply of the town clerk to this letter was dated July 3rd, the very day on which the period of fourteen days from the affixing of the notice to Mr. Locker's door would expire, and Mr. Locker's solicitor would probably not get it till July 4th. This letter began with the following statements:

(1) that on the 26th June (the day on which Mr. Locker went into occupation) the premises were "already under his [the town clerk's] control";

(2) that the town clerk was there as agent for the Minister of Health; and

(3) that if the owner entered without the town clerk's permission, he would commit an offence under the Defence Regulations.

Mr. Locker's solicitor replied to this letter of the town clerk on July 8th giving the information requested by the town clerk and asking for the return of the keys, and on the following day, July 9th, the town clerk replied asking about Mr. Locker's house in Cheshire and concluded his letter with the following sentence:

> I shall then be in a position to take the instructions of the Ministry of Health on this matter.

On July 12th, Mr. Locker's solicitor complied with the town clerk's request, enclosing Mr. Locker's own letter, copies of which were sent by the town clerk to the senior regional officer, and after seventeen days, that is on July 29th, the town clerk replied to Mr. Locker's solicitor. The legal effect of this letter of July 29th is mentioned in No. (9) below. Mr. Locker's solicitor had been called away and only returned to his office on August 9th, on which day he wrote to the senior regional officer giving all necessary information and sent the town clerk a copy saying that he was writing because he had been told on the telephone by the senior regional officer's office that the senior regional officer would not grant an interview. There was no reply from the senior regional officer till a letter dated August 20th, reading as follows:

> I am directed by the Minister of Health to refer to your letter of Aug. 9 in connection with the above-mentioned property and to say that, after full consideration of the matter, the Minister is satisfied

> that the property was properly requisitioned on June 20, 1946, by the town clerk of Blackpool in the exercise of powers duly delegated to him by the Minister. Your client's entry on the premises at a subsequent date was, therefore, unauthorized and illegal. I am, accordingly, to request that your client will take immediate steps to vacate the house, and I am to add that the town clerk of Blackpool has been instructed that he is to take all possible action as from Aug. 31, 1946, to recover vacant possession. When your client has complied with this request, the town clerk of Blackpool will be willing to consider any reasonable claim your client may wish to make to occupy part of the house on licence.

This letter was described by Scott L. J. as an example of the very worst kind of bureaucracy.

On August 23rd, the town clerk accepting, as he had previously done, the position of mere agent for the Minister of Health, wrote to Mr. Locker's solicitor that, if the house was not vacated by August 31st, he would start proceedings for possession. This produced a very proper letter from Mr. Locker's solicitor on August 31st asking either for copies of all relevant documents or opportunity to inspect such documents.

No answer to this letter was sent, but a notice to quit was served on Mr. Locker's housekeeper. On September 11th Mr. Locker's solicitor wrote to the town clerk protesting and on the same day the town clerk wrote saying he had sent the solicitor's letter of August 31st to the Ministry of Health and was awaiting their instructions. On September 13th Mr. Locker's solicitor again asked for an answer to his letter of August 31st, but no reply came. Instead a document, described by Lord Justice Scott as "an astounding document", dated September 24th, came from the Ministry of Health in London, officially signed by an assistant secretary, and reading:

> Whereas the premises whereof particulars are set out in the schedule hereto are in the possession of the Minister of Health by virtue of reg. 51 of the Defence (General) Regulations, 1939, and the council of the county borough of Blackpool are, under the authority of the Minister, using the said premises for purposes authorised by the said regulation: Now therefore the Minister, being of opinion that it is expedient in connection with such use of the said premises so to do, hereby authorises all such acts, including the taking of any legal proceedings, as a person having an interest in the premises by virtue of which he is immediately entitled to possession thereof would, by virtue of that interest, be entitled to do for the purpose of securing the removal from the said premises of persons not entitled to occupy the same. Schedule: 131, Squires Gate Lane, Blackpool. 20 Dorset Street, Blackpool. Given under the official seal of the Minister of Health this 24th day of September, 1946. (Signed) F. L. Edwards.

The legal effect of this document is dealt with in No. (8) below.

The Blackpool Corporation's summons was issued in the county court about October 23rd "on the instructions received from the Ministry of Health" according to the town clerk's letter of that date, in which letter the town clerk did belatedly offer inspection, by appointment, at his office of the circulars relating to requisitioning. An interview followed, and on November 14th Mr. Locker's solicitor wrote a further very reasonable letter asking for copies as requested on August 31st "in order to consider the validity of the requisition", which, of course, was the cardinal issue in the then pending litigation.

On November 28th the senior regional officer of the Ministry of Health at Manchester wrote the following letter to the town clerk, which letter Scott L. J. described as "another extraordinary letter":

> I am directed by the Minister of Health to refer to your letter of Nov. 19 and to previous correspondence on the above-named subject, and to say that in order to remove all doubt as to the power of the town clerk of the county borough of Blackpool to retain possession of the premises No. 131, Squires Gate Lane, in the county borough of Blackpool, the Minister hereby ratifies and confirms all the actions of the said town clerk in connection with the taking possession of the said premises and the Minister in the exercise of his power under reg. 51 of the Defence (General) Regulations, 1939, hereby delegates to the town clerk all his functions under paras. (1) to (3) of the said reg. 51 in relation to the taking possession of the above-named premises.

For the reasons mentioned in No. (7) below, this letter of November 28th was *ultra vires* the Minister and legally a nullity.

These were the relevant facts of Mr. Locker's case, so far as the question of delegation is concerned, and on February 6th, 1947, the judge at Blackpool County Court made an order whereby the Blackpool Corporation were granted an injunction restraining Mr. Locker from continuing in the use and occupation of No. 131, Squires Gate Lane, Blackpool — his own freehold house — and awarded the Corporation £5 damages for trespass, with costs and special allowances. The county court judge held that, while the original requisitioning of the house by the town clerk was unauthorised, subsequent letters to Mr. Locker's solicitor and to the town clerk had the effect of validating the town clerk's excess of authority. Mr. Locker appealed from this decision of the county court judge, and the decision was reversed by the Court of Appeal (consisting of Scott, Asquith and Evershed, L.JJ.) for the following reasons.

(1) The circulars contained (together with much explanatory matter) ministerial legislation with statutory force transferring to the local authorities concerned the Minister's legal power to override the common law rights of individual members of the public for the purposes defined in the circulars and limited by their conditions. In any area of local government, where the Minister had by his legislation transferred such powers to the local authority, he for the time being divested himself of those powers, and, out of the extremely wide executive powers, which the primary delegated legislation contained in Regulation 51(1) had conferred on him to be exercised at his discretion, retained only those powers which in his sub-delegated legislation he had expressly or impliedly reserved for himself.

(2) The notice of June 20th served by the Blackpool Corporation on Mr. Locker, and also affixed to his property, purported to requisition the house and its contents, and it was therefore inoperative because the Corporation was by the terms of the sub-delegated legislation (*i.e.* the circulars) forbidden to requisition furniture and a similar illegal usurpation of power was attempted in the Corporation's omission to have the furniture put into a separate room at the time of requisition, or immediately after it. Consequently, the notice of June 20th, combined with the taking of the keys of the premises *colore officii*, involved an actual taking possession of both house and furniture, which in law was a trespass by the Corporation.

(3) The condition that "the requisition is subject to the right of the Minister at any time to direct the authority to hand over the premises to the person otherwise entitled to possession" was of indirect importance because, as stated by Scott L.J., "it shows conclusively the nature of the devolution of powers effected, namely, that it was true law-making delegation of power to do things which otherwise the delegate would have had no legal right to do. It was essentially not a creation of agency. The Minister of Health was not principal and the local authority was not agent. The reservation of the right of control would have been superfluous had it been agency." Whether or not that condition in the circular created the relationship of principal and agent is a question of law, not fact, and it was an issue on which the Court of Appeal differed from the county court judge.

(4) The conditions specified in circular No. 138 (see above) were, in the opinion of Scott and Asquith L.JJ., "conditions subsequently resolutive in effect. The first part of No. 3 [of the said conditions] means what it says. 'Shall not proceed further

in the matter' is mandatory and imperative. It is also self-contained, i.e. independent of any other condition. This aspect is emphasised and borne out by the later sentences in the condition, additional to and separate from the first, but not as imperative as the first. The authority is directed, but subject to its own discretion, *also* to give consideration etc."[2] Evershed L.J. felt he could not come to such a definite conclusion as the two other members of the court had come as to the legal effect of the provision in circular No. 138 for giving to the owner or tenant a reasonable opportunity to let or occupy the house. His Lordship pointed out that this provision found no place among the conditions in the first part of the appendix to circular No. 2845 (see above), and stated that the provision was linked with para. 9 of circular No. 2845, "which in form at least is, to my mind, more akin to a direction or instruction than to a limitation of powers". He expressly stated, however, that he must not be taken to be saying that his suggestion was correct. He was not prepared to come to such a firm conclusion on this point as his brother judges.

(5) The extension of the delegation period by circular No. 141 from 30th June, 1946, to 31st December, 1946, was prospective and not retrospective and did not validate the invalid requisition of 20th June, 1946.

(6) On the notification by Mr. Locker, on June 26th, 1946, of his intention himself to occupy, the Corporation ought to have taken their hands right off ("shall not proceed further in the matter"). The house was never, in fact, "occupied" by the Corporation, and when Mr. Locker entered he occupied an unoccupied house of which the Corporation never had any such possession in law as would make Mr. Locker then or thereafter a trespasser. From June 26th the town clerk and the Corporation were legally debarred by the statutory inhibition of the circulars from "proceeding further in the matter" since they had definite knowledge of the owner Mr. Locker's intention to occupy the house himself. This being the legal position, the three statements about his own position with which the town clerk began his letter dated July 3rd to Mr. Locker's solicitor (see above) were misleading statements.

(7) Since the Blackpool Corporation had an independent duty under the sub-delegated legislation and was not a mere agent of the Minister (see No. (1) above) the Ministry of Health had no business to be giving the town clerk instructions in the matter. Consequently the last sentence of the town clerk's

[2] *Per* Scott L.J.

letter of July 9th reading "I shall then be in a position to take the instructions of the Ministry of Health on this matter" should never have been written. The Minister's "circulars" were not mere executive directions, but delegated legislation with statutory force, conferring powers on the Corporation which they would not otherwise have possessed and imposing on them duties for the reasonable protection of the individual house-owner. "Circulars" was the name the Minister of Health gave to his sub-delegated output of laws made in exercise of the law-making function entrusted to him by Regulation 51(5). It is the substance, and not the form or the name, that matters.

(8) Judicially, the document dated September 24th from the Ministry of Health in London was a *brutum fulmen* but it was obviously intended, and improperly so intended, to help the Corporation in their endeavour to get legal possession. Scott L.J. said he could only suppose that it was an attempt to put into a semblance of legal form the decision of the Minister expressed in the letter of August 20th, which decision the Minister had not the shadow of jurisdiction to make. "The attempt", said Scott L.J., "was so great a breach of constitutional propriety that I do not know any legal epithet suitable for it, and this court is not concerned with the Minister's responsibility to Parliament."

(9) The county court judge had held that from July 29th, the date on which the town clerk wrote to Mr. Locker's solicitor, Mr. Locker's possession of the house became unlawful on the ground that, by the letters of July 29th and August 20th, the Minister himself requisitioned and thereby came into possession. This view was held by the Court of Appeal to be wrong on the grounds

(a) that the Minister had not in his sub-delegated legislation reserved power so to act;

(b) that neither the corporation nor its town clerk was acting as the Minister's agent; and

(c) that the Minister did not, in fact, then requisition or take possession.

(10) The argument that, by any of his letters to the town clerk or Mr. Locker, the Minister ratified the inoperative requisition by the corporation on June 20th was wholly misconceived, for the reasons already stated.

It is perhaps superfluous to add that the decision of the Court of Appeal that there was no foundation for the claim of the corporation for damages for trespass and for an injunction

and that their action ought to have been dismissed with costs by the county court judge, and that consequently the appeal of Mr. Locker must be allowed with costs, both in the Court of Appeal and below, was a unanimous decision. It is equally obvious that the case raises matters of the utmost inportance to the ordinary citizen, and a word or two must be said about them.

Sir Cecil Carr, K.C., Counsel to the Speaker of the House of Commons, as long ago as 1921 expressed the following views: "Like all other law it [delegated legislation] ought not only to be certain but also to be ascertainable. We do not want to be shot at dawn to-morrow and not know why. . . . As soon as rules have been finally made, they should have as great post-natal publicity as statutes, for they are just as much part of the law which the King's subjects are taken to know." [3] In 1921 the Rules Publication Act, 1893, was in force, and section 1 of that Act provided that, wherever any statute authorised the making of statutory rules and directed the laying of those rules before Parliament, at least 40 days' notice had to be given in the London Gazette of the proposal to make the rules, and of the place where copies could be obtained.[4] These provisions Sir Cecil Carr called "ante-natal" because they took effect at a time when the statutory rule was not yet born but was merely thought of.[5] Post-natal publicity of delegated legislation was dealt with by section 3 of the same Act, which section provided for the numbering, printing and placing on sale of delegated legislation, and the system ensured that the public could obtain copies of all delegated legislation.[6] The Committee on Ministers' Powers was of the opinion that, while the Rules Publication Act, 1893, had worked well within its sphere of application, the time had come to repeal it and replace it by a simpler and more comprehensive measure on the lines it recommended in paragraph 15 of its report.[7] The Statutory Instruments Act, 1946, which came into force on January 1st, 1948, repealed the 1893 Act from that date. The 1946 Act, like the 1893 Act, is expressly limited to such delegated legislation as is made under powers conferred by Act of Parliament, whether on His Majesty in Council or on a Minister of the Crown. Such delegated legislation — which can be

[3] Delegated Legislation, p. 33.

[4] There were cases outside the scope of s. 1, but they are not relevant to the present discussion.

[5] Delegated Legislation, p. 34.

[6] There were limitations but they are not relevant for present purposes.

[7] Report of the Committee on Minister' Powers, Cmd. 4060 of 1932, para. 14(e). Lord Justice Scott, then The Rt. Hon. Sir Leslie Scott, KC., was Chairman of the Committee on Ministers' Powers.

termed "primary delegated legislation" — has to be printed forthwith by the King's Printer and published as statutory instruments (called statutory rules and orders up to January 1st, 1948). But for delegated legislation made under powers conferred by a regulation or other legislative instrument not being itself an Act of Parliament, *e.g.* "the circulars" made by the Minister of Health under Regulation 51(5) — which kind of delegated legislation can be termed "secondary delegated legislation" or "sub-delegated legislation" — there is no general statutory requirement of publicity in force today. When one realises that there is now virtually no limit to the quantum of sub-delegated legislation or to the field of activity covered by such delegated legislation, one can see how vital it is that steps should be taken to create a system under which any affected member of the general public has a right to be supplied with the fullest information of the delegated legislation — both primary and sub-delegated — affecting his legal position. The facts of *Blackpool Corporation* v. *Locker* show that Mr. Locker's solicitor had the greatest difficulty in ascertaining from either the corporation or the Ministry what his client's rights were, and the case is a glaring illustration of the danger of the non-publication of sub-delegated legislation.

So far as sub-delegated legislation is concerned, there is at present no real safeguard.

The Statutory Instruments Act, 1946, should be amended to make publication of all types of delegated legislation a statutory obligation. Publication, too, would surely be of assistance to those who exercise powers to make delegated legislation, as a proper investigation of the validity of such legislation and of its legal consequences could and would be made by all interested parties, which would minimise the risk of such legislators putting forward such gravely erroneous claims and contentions as were put forward by the Blackpool Corporation, the Minister of Health and the senior officers of the latter's department in Mr. Locker's case, and would also enable such legislators to adopt the right attitude towards the rights of the individual. As Scott L.J. observed, the liberty of the subject would have been seriously and wrongfully prejudiced had the claims and contentions put forward by the parties opposing Mr. Locker been enforced. "The startling feature of the whole story before the court is that both the corporation and the officers of the Ministry of Health, when writing the letters in the correspondence and taking the views and actions therein appearing, radically misunderstood their own legal rights and duties, and appear to have been oblivious of the rights of the private householder affected" (Scott L.J.).

Quite a lot of trouble might have been avoided if the Ministry of Health had remembered the sound advice given by the Committee on Ministers' Powers when it said, "In the ordinary life of the community what is above all important is that legislation, whether delegated or original, should be expressed in clear language".[8] No harm would be done if every civil servant had to satisfy an outside Board of Examiners that he had read and understood the Report of the Committee on Ministers' Powers. In fact, such a requirement might produce good, as it would possibly result in an easing of the present strain on the British Constitution.

The *Locker* case is important because it is the first case where the sub-delegated aspect of delegated legislation has come before the English courts for direct consideration.

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CIVIL RESPONSIBILITY—ABUSE OF PROCESS—CRIMINAL PROCEEDINGS TAKEN WITHOUT REASONABLE AND PROBABLE CAUSE—CONSULTATION WITH A LAWYER—EVIDENCE RECEIVED AFTER CHARGE LAID.—Since the conquest of New France Quebec courts have shown a tendency to follow English authority in cases that should have been decided under the civil law. At one period the tendency was particularly noticeable in actions for abuse of process or, as the Quebec courts loosely called it, "malicious prosecution". The reference to English authorities in this field is partly to be explained by a more or less vague feeling that judicial process is a matter of public law and that, since much of Quebec's public law came from England, English authorities should be applied to the misuse of judicial process. There was greatest justification for this feeling where, as frequently though by no means always happened, the process the plaintiff alleged had been misused was part of the federal criminal law. No doubt another explanation for the dependence on English authority was that English textbooks, with their full references to decided cases, were a convenient source of precedents for Quebec lawyers at a time when their own jurisprudence and *doctrine* were limited. Whatever the reason, the grafting of common-law principles, often imperfectly understood by civilians,

[8] Cmd. 4060 (1932), para. 10.

on the civil law confused Quebec law, made it less certain, and complicated the task of the lawyer who had to advise a client.[1]

The principle that damage actions for abuse of process should be decided in Quebec by reference to the civil law has been laid down once more by the Court of King's Bench (In Appeal) in the recent case of *Sirois* v. *Dame Bernier*.[2] Fifty years ago, Quebec courts commonly held, borrowing the common-law phraseology, that a plaintiff could not succeed in such cases unless he established malice and lack of a reasonable and probable cause. In so holding they ignored article 1053 of the Quebec Civil Code which provides that "Every person capable of discovering right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill"; malice is not a necessary ingredient of fault under this article. More recent judgments[3] have said that damage actions for abuse of process are governed by article 1053, but Quebec lawyers, probably from an excess of caution, have often continued to allege malice as well as lack of reasonable and probable cause in their pleadings. It is to be hoped that the judgment of Quebec's court of appeal in the *Sirois* case will settle the law once and for all on this point. Damage actions alleging misuse of process are governed by article 1053; lack of reasonable and probable cause is a fault under article 1053 and it is sufficient for a plaintiff to prove the absence of reasonable and probable cause; to succeed he need not allege or prove malice.[4] Nor is it necessary for the courts to say, as they have done even recently, that malice will be presumed if lack of a reasonable and probable cause is proved.

There are some minor discrepancies between the facts as described by Mr. Justice Barclay, who delivered the leading judgment in *Sirois* v. *Dame Bernier*, and those mentioned in the dissenting judgment of Chief Justice Létourneau. Briefly, however, the facts were as follows. The wife of Sirois, the defendant-appellant, ran the Hôtel Madeleine at Rivière Madeleine on the Gaspé Peninsula. On the other side of the main road is the Hôtel Bon Accueil, or Hearty Welcome Hotel, run by Dame Bernier,

[1] See also my little book, The Responsibility for Offences and Quasi-Offences under the Law of Quebec (1938), pp. 31 *ff*.

[2] [1948] K.B. 615. Chief Justice Létourneau dissented, not on the soundness of this principle, but on the application of the civil law to the facts before the court.

[3] *E.g.*, Tyndale J. (as he then was) in *Prime* v. *Keiller, Rainville and City of Montreal*, [1943] R.L. 65. This judgment was expressly approved by Mr. Justice Barclay and Mr. Justice Galipeault in the *Sirois* case.

[4] Whether a defendant who has acted with reasonable and probable cause, but at the same time maliciously, will be responsible in damages is another question.

the plaintiff-respondent. In August 1946 the defendant Sirois, or his wife, placed a sign or signs near the main road, with the words "Hearty Welcome" and an indication pointing to her hotel, the Hôtel Madeleine. This sign, not unnaturally, caused some confusion in the minds of two tourists, who mentioned the fact that evening in the Hôtel Bon Accueil. The following day the sign had disappeared. After some acrimonious communications between the parties, during which the plaintiff was alleged to have admitted that she had removed the sign, the defendant swore out a complaint against her for theft, which was subsequently dismissed by the magistrate before whom it came. In the resulting action for false arrest, the trial judge, Mr. Justice Langlais, awarded Dame Bernier damages of $830.79. Apart altogether from the question of guilt or innocence, one can have a certain sympathy for her in the circumstances.

Since article 1053 was held to apply, the remaining question before the Court of King's Bench was whether, on the evidence, the plaintiff had established that the defendant acted without reasonable and probable cause in laying the criminal charge against her, or, to borrow the words of Mr. Justice Tyndale in the *Prime* case,[5] acted "without first having taken the steps or obtained the information which a reasonable man (or a 'bon père de famille') would consider necessary and proper in the circumstances". It would be profitless to discuss in detail the evidence, and the interpretations put upon it, which led Mr. Justice Barclay and Mr. Justice Galipeault of the majority to hold that the appeal should be dismissed, and Chief Justice Létourneau to conclude that, because the plaintiff had not discharged her onus, the appeal should be allowed. Two practical points arise however from the judgments, which might be mentioned.

The first is the effect to be given to the fact that the defendant had consulted a lawyer before instituting the criminal proceedings. This is of course a common defence in actions for misuse of process. All Mr. Justice Barclay says on the point is, "True, he [the defendant] consulted a lawyer, but we have only his own version of what he told his lawyer and what he told him was confined to the telephone conversation and to the subsequent declarations of the plaintiff and her husband". Mr. Justice Galipeault goes a bit farther. It is not sufficient, he says, to exonerate the defendant for him to say that he received the advice of a legal adviser; no one knows what he told the lawyer or what advice the lawyer gave him. Chief Justice

[5] [1943] R.L. 65, at p. 80.

Létourneau, after saying that the defendant had consulted a lawyer and had taken his advice, concedes that this is not enough. It seems perfectly clear that a defendant who wishes to rely on the fact that he has consulted a lawyer must be prepared to substantiate exactly what passed between them. Even if it is shown that all relevant facts were disclosed to the lawyer, however, the jurisprudence is to the effect that the mere fact of acting on his advice is not in itself a complete defence to an action for misuse of process.[6] But it is one of the relevant circumstances that should be taken into account and one that should have very great weight with the court.

The second point arises out of Mr. Justice Barclay's statement in the course of his discussion of the evidence that "The question is not what the actual facts were but what the prosecutor had reason to believe they were at the time he instituted the proceedings". Previously he had said: "At this trial there is some, although doubtful, corroboration of the defendant's testimony as regards the declarations of the plaintiff and her husband, but it is well to note that the defendant did not have that corroboratory evidence at the time he laid the charge . . .". If the learned judge intended to lay it down as a principle that only the facts in the defendant's possession at the time he instituted the criminal proceedings will be taken into account in deciding whether he had reasonable and probable cause, the principle is presumably subject to these qualifications: that, if sufficient evidence comes to light after the criminal proceedings are instituted to lead the criminal court to find the accused guilty, the accused will have no action in damages; and that evidence coming to light after the institution of criminal proceedings may be taken into account in deciding whether the prosecutor's story as to the facts in his possession at that time is to be believed.

In no case of abuse of process is the sole task of the court to adjudicate between the narrow interests of the parties; always considerations of public policy are interjected, as no doubt the Quebec judges who in the past have applied the common law were conscious. The public interest in democratic countries, civil-law as well as common-law, requires that those who feel they have been wronged should have ready access to the courts of justice. If the courts are to be really open, it follows inevitably that persons against whom proceedings are taken will sometimes

[6] See for instance: *Calogery* v. *Spencer* (1914), 47 S.C. 12 (Court of Revision); *Baillargeon* v. *Steele* (1922), 33 K.B. 421; *Gaston* v. *Jasmin* (1928), 45 K.B. 329.

be inconvenienced unnecessarily; this is the price they pay for their democratic privileges. In actions for abuse of process, the courts must always balance the inconvenience suffered by the plaintiff and the fault of the defendant against the public interest, for if damages are given lightly legitimate recourse to the courts may be discouraged. For this reason it is right that Chief Justice Létourneau should have emphasized in the *Sirois* case that the onus of establishing lack of reasonable and probable cause rests on the plaintiff. The fact that malice is not required by article 1053 does not necessarily mean that damages for abuse of process should be given more readily in Quebec than in common-law jurisdictions.

G.V.V.N.

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HUSBAND AND WIFE—LEGAL PROCEEDINGS—PROTECTION OF SEPARATE PROPERTY—TORT BY HUSBAND BEFORE MARRIAGE—"THING IN ACTION"—MARRIED WOMEN'S PROPERTY ACTS.—That perennial darling of the courts, the married woman, has again found favour in the eyes of the Court of Appeal in England in a way which might not have been appreciated by the late Mr. Justice McCardie. Though a confirmed bachelor, he had views he did not hesitate to express on matrimony and the law's injustices towards husbands.

In *Gottliffe* v. *Edelston*[1] McCardie J. had to consider the effect of the Married Women's Property Act, 1882, on a set of facts that any sociologist would consider unusual; the point at issue was narrow but McCardie J. seized a heaven-sent opportunity to criticize, in a brilliant *obiter dictum*, the historical, theological and legal concept of the "unity" of husband and wife and the ambiguity and obscurity of the Act. The Court of Appeal in *Curtis* v. *Wilcox*[2] has now overruled *Gottliffe* v. *Edelston* and thrown some light on the statutory obscurity that McCardie J. could not penetrate. However, since it was not necessary "to express views on the nature of the social relationship which should exist, from the point of view of the law, between husband and wife",[3] the Court of Appeal has joined another English judge in preferring to say nothing on this absorbing topic.

The facts in *Gottliffe* v. *Edelston* and *Curtis* v. *Wilcox* were almost identical. In each case, a gentleman took his fiancée for

[1] [1930] 2 K.B. 378; 99 L.J. K.B. 547. See previous comment in (1931), 9 Can. Bar Rev. 41.
[2] [1948] 2 All E.R. 573.
[3] *Per* Hallett J. in *Chant* v. *Read*, [1939] 2 All E.R. 286, at p. 294.

a drive in his car and was involved in an accident in which she was injured; she instituted proceedings against him for damages and while those proceedings were pending became his wife. For the benefit of those who may share McCardie J.'s surprise that the lady should expose the gentleman to litigation which some would consider "unseemly, distressing and embittering" and yet be prepared to enter with him upon the state of matrimony, it may be observed that in each case the husband carried third party liability insurance. Though the underwriters denied liability, they were unable to influence adversely the course of true love.

At common law neither spouse could sue the other for a tort but the Married Women's Property Act, 1882, made certain exceptions to this rule, one of which was that a married woman might sue her husband in tort "for the protection and security of her property" which should "belong to her at the time of marriage".[4] The Act defines "property" to include a thing in action and the sole point at issue was whether the lady's cause of action in tort which arose before the marriage survived notwithstanding the marriage; in other words, whether it was a thing in action that belonged to her at the time of marriage. McCardie J.'s anxiety to protect the husband from a newly conceived legal injustice led him to hold that "thing in action" must be given a limited meaning and did not extend to a right of personal safety and security. Notwithstanding McCardie J.'s strictures on the ambiguity and obscurity of the Act, the Court of Appeal had no difficulty in holding that there was no ground for limiting the sense in which the expression "thing in action" was used in the Act. Leaving sociological considerations aside, it is difficult to see how any other conclusion could have been reached. Mrs. Wilcox (née Curtis) thus got an award of general damages as well as the special damages to which even the trial judge had conceded she was entitled.

The significance of the principle in *Curtis* v. *Wilcox* is obviously limited by practical and sociological considerations. If during the period of engagement the gentleman should defame or maliciously prosecute the lady or trespass, against her will, on her person or property, it can safely be predicted that the marriage which had been arranged would not now take place and that any resulting proceedings would not be between parties enjoying the status of husband and wife. Even where the cause

[4] The material parts of sections 1, 2 and 12 are quoted in the judgment of the Court of Appeal. The amendment made to section 12 by Schedule II of the Law Reform (Married Women's and Tortfeasors) Act, 1935, is not material in the instant cases.

of action arises out of the gentleman's negligence the application of the principle is equally likely to be limited to cases where the gentleman carries liability insurance.

Having regard to the language of the Ontario Married Women's Property Act,[5] there is no reason why an Ontario court should not adopt the principle laid down in *Curtis* v. *Wilcox*. However, the circumstances in which an Ontario court could be invited to apply the principle are even more limited than in England because, if the lady's claim arose in Ontario out of injuries sustained while a passenger in the gentleman's car, her right of action under the Married Women's Property Act must be treated as overridden by section 47 (2) of the Highway Traffic Act,[6] which precludes a gratuitous passenger from maintaining an action against the owner or driver. Section 47 (2) was enacted five years after the decision in *Gottliffe* v. *Edelston*, but it may be doubted if the legislature ever considered McCardie J.'s *obiter dicta* or consciously provided this relief for husbands whose attention had wandered from the road while in the company of their brides to be. Nevertheless, even in Ontario, a gentleman intent on matrimony should avoid running down his fiancée, carrying her as a gratuitous passenger in his buggy or on his bicycle and, if he is a taxi driver, picking her up as a fare. In addition, he should not invite her to the apartment he occupies unless he has used reasonable care to satisfy himself that his invitation will not expose her to damage from any unusual danger of which he knows or ought to know,[7] including any such new danger that might arise after she had entered the apartment at his invitation.[8] It is, however, still unnecessary for the lady to avoid similar indiscretions on her part.

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[5] R.S.O., 1937, c. 209, ss. 1, 2 and 7. The language has been simplified but section 12 "is almost an exact copy" of section 12 of the English Act; see Smith J. in *Macklin* v. *Young*, [1933] S.C.R. 603, at p. 607. Note that Smith J. mistakenly cites *Gottliffe* v. *Edelston* as authority for the proposition that one spouse cannot sue the other for a tort committed *during the wife's coverture*.

[6] R.S.O., 1937, c. 288 as enacted by 1935, c. 26, s. 11. In support of the view that the wife's rights are overridden, see *Martin* v. *Kingston City Coach Co.*, [1946] O.W.N. 915, affirmed without reasons, [1947] O.W.N. 110 (C.A.).

[7] *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274, *per* Willes J.

[8] See *Fairman* v. *Perpetual Building Society*, [1923] A.C. 74, *per* Lord Wrenbury at p. 96.