CASE AND COMMENT

CONSTITUTIONAL LAW — DELEGATION BY PARLIAMENT TO PROVINCIAL LEGISLATURES AND VICE-VERSA — NOVA SCOTIA BILL 136, THE DELEGATION OF LEGISLATIVE JURISDICTION ACT.— It has long been a moot point whether it was possible for Parliament to delegate its powers to the legislatures of provinces, or whether provinces could delegate their powers to Parliament. Obviously neither Parliament nor the legislatures, nor the two acting together, can effect an amendment to the B.N.A. Act by permanently transferring jurisdiction from section 91 to section 92, or vice-versa. The only manner in which jurisdiction can be thus transferred, short of an amendment to the Act, is under section 94, which permits any province except Quebec to hand its jurisdiction over property and civil rights to the Dominion *in perpetuo*. The Dominion cannot similarly divest itself of jurisdiction in favour of provinces; the Fathers of Confederation provided a method whereby Canada might grow more unified but none by which she might reduce or weaken the authority of the national Parliament. Any permanent shift of jurisdiction is therefore limited to this special case of provinces giving up powers. The problem of delegation as it arises today is the narrower one of deciding, not whether any permanent shift of jurisdiction is possible, but whether either type of legislature, instead of legislating directly itself, can authorize the other to legislate for it and in its place, in the same manner as either of them may delegate its legislative power to the Governor in Council or to an administrative Board.

This question, which till now has received some but no conclusive judicial attention,[1] was brought squarely before the Supreme Court of Nova Scotia in a recent reference, as yet unreported. It arose on a reference to the court of a Bill, No. 136, which was given first reading by the legislature in 1947. The Bill provides as follows:

> BE IT ENACTED by the Governor and Assembly as follows:
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> 1. This Act may be cited as The Delegation of Legislative Jurisdiction Act.
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> 2. The Governor in Council may, by proclamation, from time to time delegate to and withdraw from the Parliament of Canada authority to make laws in relation to any matter relating to employment in any industry, work or undertaking in respect of which such matter is, by Section 92 of the British North America Act, 1867, exclusively within

[1] In *Rex* v. *Zaslavsky*, [1935] 3 D.L.R. 788; *Rex* v. *Brodsky*, [1936] 1 D.L.R. 578; *Rex* v. *Thorsby Traders*, [1936] 1 D.L.R. 592.

the legislative jurisdiction of this Legislature and any laws so made by the said Parliament shall, while such delegation is in force, have the same effect as if enacted by this Legislature.

3. If and when the Parliament of Canada shall have delegated to the Legislature of this Province authority to make laws in relation to any matter relating to employment in any industry, work or undertaking in respect of which some matter is, under the provisions of the British North America Act, 1867, exclusively within the legislative jurisdiction of such Parliament, the Governor in Council, while such delegation is in force, may, by proclamation, from time to time apply any or all the provisions of any Act in relation to a matter relating to employment in force in this Province to any such industry, work or undertaking.

4. If and when the Parliament of Canada shall have delegated to the Legislature of this Province authority to make laws in relation to the raising of a Revenue for Provincial Purposes by the imposing of a retail sales tax of the nature of indirect taxation, the Governor in Council while such delegation is in force, may impose such a tax of such amount not exceeding three per cent (3%) of the retail price as he deems necessary, in respect of any commodity to which such delegation extends and may make regulations providing for the method of collecting any such tax.

5. This Act shall come into force on, from and after, but not before, such day as the Governor in Council orders and declares by proclamation.

Six questions were framed in the order for Reference, testing the constitutionality of these provisions. In the result Chisholm C. J., with Archibald J. concurring, and Carroll and Hall JJ., considered the whole Bill invalid, while Doull J. dissented, holding the Bill valid with some qualifications. The Nova Scotia Court thus joins the Courts of Appeal of the three prairie provinces in opposition to this type of delegation.

The two principal judgments are those of Chisholm and Doull, the one against and the other for the constitutionality of the Bill. Chief Justice Chisholm notes that no mention of the power to delegate is found in the B.N.A. Act and, "if the British Parliament intended to give such power, it is difficult to believe that it would not use express language to confer so novel and far-reaching a power". He refers to the absence of any such power in the American constitution, and cites Cooley on Limitations[2] and Chief Justice Marshall in *Wayman* v. *Southard*.[3] The latter says:

They [the State Assemblies] possess no portion of that legislative power which the Constitution vests in Congress and cannot receive it by delegation.

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[2] (1903 ed.), p. 163.
[3] (1825), 10 Wheaton at p. 48.

He considers that the notion of delegation was never present in the minds of the framers of our constitution. Further, he points out that, if delegation were intended, section 94 of the B.N.A. Act providing for uniformity would be entirely unnecessary. The word "exclusively" as applied to provincial powers under section 92 in his view "clearly indicates that a settled line of demarcation was intended to be made between the subjects upon which the Parliament of Canada should have power to legislate and those upon which the provincial legislatures might legislate". He admits, as indeed he is obliged to do, that a legislative body has power to delegate "to subordinate bodies of its own creation or selection or to individuals authority to make regulations for the purpose of carrying into execution and making effective its own acts", but he contends that this power "is different from a power to cede authority to another independent legislative body". Unfortunately on this crucial point he gives no reasons, other than to say that "in the case *Re Gray*, 57 S.C.R. 150, the distinction can be observed". After reviewing various judicial and other opinions to the effect that the federal Parliament cannot give to the provinces a power which they do not possess by the B.N.A. Act and that it cannot divest itself of a legislative power, he concludes that the power to delegate mentioned in the Bill cannot be upheld.

Before analyzing the contrary views of Mr. Justice Doull some comments may be permitted on this line of argument. In the first place, any reference to the American constitution appears to overlook the radical difference between our legislatures and theirs. Canadian legislatures are sovereign bodies, enjoying legislative capacity as plenary and as absolute, within their respective spheres, as those of the United Kingdom Parliament itself.[4] American legislatures are delegates operating under limited powers. It is not necessary to find a power of delegation expressly mentioned in the B.N.A. Act; the power exists as inherent in a sovereign legislature, unless taken away. Hence the widespread practice of delegation by Parliament and provincial legislatures to Boards, Commissions, Municipalities, Privy Councils, and other types of body. Why is another legislature excluded from the list of possible recipients of delegation? The stock answer is that this changes the distribution of power set out in the constitution. But it does no such thing if delegation is distinguished from divestment or abdication. When the Dominion Parliament says to a provincial legislature "You may make our

[4] *Hodge* v. *The Queen* (1883), 9 App. Cas. 117, at p. 132.

laws for us on this matter", the legislature is nothing more than the draftsman for the Dominion. The authority of the laws it thus makes comes not from itself, but from the Dominion. No power whatever has been subtracted from Parliament or added to the legislature. Parliament can at any moment take back what it has granted, thus proving conclusively that no shift of authority has occurred. The same is true of delegation from a legislature to Parliament. If all the senators and members of Parliament happened to be in Nova Scotia, there would be nothing to prevent their accepting delegated authority to draw up legislation to which a Nova Scotia statute would give the force of law. Does residence in Ottawa and the choice of the Parliament buildings as their place of work change the nature of their operation? With respect, Chief Justice Chisholm's approach is the reverse of the true one. Instead of refusing the power to delegate unless it can be found in the B.N.A. Act, he should have sought for a reason to impose another limitation on the sovereignty of our legislatures which is not mentioned anywhere in the Act. For if we say that a province cannot select any persons it chooses to be its delegates, we are imposing upon it a new limitation.

This is where the judgment of Doull J. is so much more precise and convincing. He stresses the sovereignty of Canadian legislatures. "The powers of the Dominion and the provinces together are as great in regard to Canadian matters as the powers of the British Parliament are in regard to British matters." The exception, found in the Statute of Westminster, relates to the amendment of the B.N.A. Act. The British Parliament can and does delegate legislative power to other legislatures as well as to other subordinate bodies. Canadian law, Dominion as well as provincial, is rich in examples of delegation. But here it is necessary to distinguish various types of legislative expedient, and Mr. Justice Doull establishes three categories: legislation by adoption or reference, conditional legislation, and delegated legislation. That these are not too easy of separation is well known,[5] but the definitions are essential to a solution of the problem. The third is the one at issue, and is described in these terms:

> Legislation by delegation occurs when the body which has power to legislate grants power to some other body to enact certain legislation in the place and stead of the granting body.

To make the concept more clear, he cites a passage of Wills J. in *Huth* v. *Clarke*:[6]

[5] See J. A. Corry, Difficulties of Divided Jurisdiction, Appendix 7 to the Sirois Report, pp. 37 *ff*.
[6] (1890), 25 Q.B.D. 391.

> Delegation, as the word is generally used, does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself.

Delegation is thus a mere matter of agency. There is no changing of the constitution or breaking down of the "watertight compartments". Duff J. said the same thing in *Re Gray:*[7]

> The true view of this type of legislation is that the subordinate body in which the law-making authority is vested by it is intended to act as the agent or organ of the legislature, and the acts of the agent take effect by virtue of the antecedent declaration (express or implied) that they shall have the force of law.

Since delegation of this character is quite proper, the only question is whether there is anything which prevents Parliament from selecting a legislature, or a legislature Parliament, as the recipient of the delegated powers.

This question is fully explored in Doull J.'s judgment and every unfavourable argument is carefully met. That the delegate must be the creature of the delegating body is clearly untenable, since the Governor in Council is not created by the legislature and is the most frequent recipient of delegated powers. The delegate must be "subordinate", but so would a legislature be in respect of the matter delegated, since the power granted can always be taken away. As for the word "exclusively" in sections 91 and 92, the use of an agency which only acts as the spokesman of its principal leaves the jurisdiction in the "exclusive" control of the original grantor. The legislation in question is not in force by reason of any transfer of authority, but by reason of the exercise of the original exclusive authority through the selected agent. Some form of "co-operation" between Dominion and provinces has been recommended by the Privy Council,[8] and the experience in the *Marketing Act* case showed that:

> If co-operation is to be effective and certain, there should in these cases where co-operation is necessary, be one enactment bearing the authority of both Parliament and legislature and that can only be done in some such way as is here suggested.

He therefore found nothing contrary to the "spirit of Confederation" in Bill 136. Nor did any previous decision of the courts stand in the way: the three cases from the prairie provinces[9] were based on a reported statement of Lord Watson in the *Bonsecours*

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[7] 57 S.C.R. 150, at p. 170.
[8] *E.g.*, in the *National Products Marketing Act* case, [1937] A.C. 377, 389.
[9] See footnote 1, *supra*.

case,[10] found only in Lefroy,[11] in which the notion of delegation was not used in the sense in which it is defined above. In consequence he held that delegation was permissible as between Parliament and the legislatures. As regards Bill 136 itself, he found it on the whole unobjectionable so long as the delegation contemplated did not amount to abdication, and bearing in mind that any money raised under section 4 of the Bill would be Dominion money subject to sections 53 and 54 of the B.N.A. Act.

In the short space of a case note the important issues raised by this decision can only be touched on briefly. It is the opinion of this writer that Mr. Justice Doull's judgment is the most thorough and most thoughtful treatment of this difficult problem which has yet been given from the Bench in Canada. The weakness of the judgments of Chisholm C. J., of Carroll J. and of the courts in the *Zaslavsky*, *Brodsky* and *Thorsby Traders* cases is that the nature of delegation is not sufficiently analyzed, and the distinction between abdication or divestment, where the control is abandoned, on the one hand, and mere selection of a temporary agent or subordinate body with full retention of control, on the other, is not made clear. Until this preliminary task of definition is attempted the remarks of earlier authorities about delegation are of little value. It will be necessary also to consider, as was not done in the judgments under review, whether there may be a limitation on the provincial power of delegation that does not exist in the case of the federal Parliament, arising from the restriction on provincial powers of constitutional amendment contained in section 92(1) of the B.N.A. Act which reads:

> The Amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, *except as regards the Office of Lieutenant-Governor*.

This has been suggested as an important difference between provincial and Dominion powers of delegation,[12] though it is not easy to see why the Lieutenant-Governor is ousted from his law-making function in the case of delegation to another legislature any more than he is when delegation is directed to a municipality or Board. The further limitation is suggested that provincial delegated powers should be ancillary to legislation, *i.e.*, should

[10] *C.P.R.* v. *Notre Dame de Bonsecours*, [1899] A.C. 367.

[11] Canada's Federal System, p. 70: "The Dominion cannot give jurisdiction or leave jurisdiction with the province. The provincial parliament cannot give legislative jurisdiction to the Dominion Parliament. If they have it, either one or the other of them, they have it by virtue of the Act of 1867."

[12] See G. S. Rutherford, Delegation of Legislative Power to the Lieutenant-Governors in Council (1948), 26 Can. Bar Rev. 533.

contain a power to regulate but not to legislate.[13] Such a distinction would seem difficult to maintain since regulation itself is only a form of subordinate legislation, and when a legislature exercises delegated powers, even if they be powers of legislation, such powers are ancillary to the statute delegating them. The powers of a municipality are legislative and not merely regulative. And even if the distinction is sound, a power to delegate the regulative functions remains to the province; delegation is not barred but merely restricted.

Another aspect of the problem that would also seem to need more exploration relates to section 94 of the B.N.A. Act. Since this section contemplates a permanent divestment by the common-law provinces of certain of their powers, it differs *in toto* from mere delegation; a point that seems to have escaped Chief Justice Chisholm. But the problem still remains how to distinguish the process by which delegated power from a province is accepted by the federal Parliament and how a province gives up a power to Parliament under section 94. The two procedures might appear very similar. Certainly the adoption by provinces of the federal labour code comes close to satisfying the conditions set out in the section.[14]

It is to be hoped that the question raised by this Reference will be brought before the Supreme Court of Canada and the Privy Council for final settlement. The present constitutional impasse in Canada is becoming increasingly intolerable. A whole people in the prime of its national life will not forever suffer frustration and confinement just because the courts cannot extricate themselves from their own conceptual tangles. The acceptance of a power of delegation between legislatures would not solve all our problems, but it would open the door to many useful forms of co-operation. The question is still undecided, and it is submitted that there are good compelling reasons, legal as well as social, why it should be settled in accordance with the views of Mr. Justice Doull.[15]

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[13] *Ibid.*

[14] See F. R. Scott, Section 94 of the B.N.A. Act (1942), 20 Can. Bar Rev. 525.

[15] Similar opinions have been expressed by previous contributors to the Canadian Bar Review. See R. W. Shannon, Delegated Legislation (1928), 6 Can. Bar Rev. 245; Ian G. Wahn, note *Zaslavsky* case (1936), 14 Can. Bar Rev. 353; Raphael Tuck, Delegation — A Way Over the Constitutional Hurdle (1945), 23 Can. Bar Rev. 79. Some writers have suggested that an amendment to the B.N.A. Act is necessary: see Vincent C. MacDonald, The Constitution in a Changing World (1948), 26 Can. Bar Rev. 21, at p. 45; Harold E. Crowle, Letter to the Editor, *ibid.*, p. 901.

LARCENY — POSSESSION — ABANDONED CHATTELS TAKEN FROM LAND OF A THIRD PERSON — THE GOLF-BALL CASE. The bones of *Bridges* v. *Hawksworth*,[1] lying undisturbed since the decision of Birkett J. in *Hannah* v. *Peel*,[2] have been rattled again, briefly, indecisively and without disarranging the skeleton, by the King's Bench Division in *Hibbert* v. *McKiernan*.[3] In 1851, two judges of the Queen's Bench, sitting on an appeal from a county court, held that a customer who found a parcel of money on the floor of a shop was entitled to it as against the proprietor.[4] In 1859, a trespasser was convicted of the larceny of a quantity of iron reposing on the bed of a canal where it had fallen from a passing vessel, the property in the iron being laid in the canal company.[5] In 1886, the lessor of a parcel of land was declared to have a better claim than the lessee to an ancient Roman boat found by the latter embedded in the land.[6] In 1896, a workman, who found certain rings while cleaning a pool, was held to have a claim inferior to that of the owner of the land on which they were found.[7] In 1945, the finder of a brooch in a house, being lawfully on the premises where the brooch was found, was held to have a right to the brooch as against the owner of the premises who had never been in possession of the house.[8] This year, the King's Bench Division has decided that a trespasser upon a golf course may be convicted of the larceny of golf balls found thereon, notwithstanding the fact that the balls have been abandoned by their original owners.[9]

At first glance, the case might be hailed as another nail in the coffin of *Bridges* v. *Hawksworth*. It seems clearly to endorse the view, wholly consistent with the foregoing line of cases (with the exception of *Bridges* v. *Hawksworth*), that the occupier of land is in possession of everything thereon, whether he knows of its existence or not, and that, therefore, that notable case was wrongly decided. All the judges[10] appeared to consider that the golf club was in possession of the balls at the time of the taking, but none of them attempted to settle the basic inconsist-

[1] (1851), 21 L.J.Q.B. 75.
[2] [1945] 2 All E.R. 288.
[3] [1948] 1 All E.R. 860.
[4] *Bridges* v. *Hawksworth, supra*.
[5] *Reg.* v. *Rowe* (1859), Bell 93 — case reserved by the chairman of the Glamorganshire Quarter Sessions and heard by Pollock C.B., Wightman J., Williams J., Channell B., Byles J. and Hill J.
[6] *Elwes* v. *Briggs Gas Co.* (1886), 33 Ch. D. 562 (Chitty J.).
[7] *South Staffordshire Water Co.* v. *Sharman*, [1896] 2 Q.B. 44 (Lord Russell of Killowen C.J., Wills J.).
[8] *Hannah* v. *Peel, supra*.
[9] *Hibbert* v. *McKiernan, supra*.
[10] Lord Goddard C.J., Humphreys and Pritchard JJ.

ency between such a view and *Bridges* v. *Hawksworth*. Two judges thought that the problem did not arise at all; perhaps because where there is a clear-cut authoritative precedent to follow,[11] such problems may more conveniently be ignored.

In *Hibbert* v. *McKiernan* the accused was a trespasser upon the premises of the Reddish Vale Golf Club. There is no doubt that he went there for the purpose of taking and selling any golf balls he might find. He picked up eight golf balls, all of which, according to the finding of the Stockport justices, had been abandoned by their original owners. That is, not merely possession, but title as well had been given up. The justices also found that the police were, to the appellant's knowledge, watching for the purpose of preventing the taking of balls and warning off trespassers. The golf balls were found in the appellant's possession and he admitted that he knew he had no right to take them. In these circumstances, the justices were of opinion that the appellant had intended to steal the balls, and did steal them, but that there was some doubt, in law, as to whether or not he could be convicted of larceny. The resolution of this doubt would, in turn, depend upon whether he had acquired any right or title as a finder, the balls having been abandoned by their original owner. There followed a detailed consideration by the justices of the line of cases cited at the beginning of this note. Lord Goddard C.J. did not, however, deem it necessary to try to "reconcile the irreconcilable".[12] Instead, in his opinion, the interesting questions posed by the conflict among the decided cases did not, in this case, arise. Why they did not arise, in view of the fact that the property in the balls was laid in the secretary and members of the Reddish Vale Golf Club, it is difficult to see. The learned Lord Chief Justice gives the following reason:

> We are here dealing with a charge of larceny, with a man who took the balls *animo furandi*, not with an honest man who, finding an article on the land of another, proclaims that fact with a view to discovering the owner if he can, and when no owner comes forward, asserts a possessory title against the owner of the land on which it was found. We need not be troubled with nice questions relating to *animus domini*, *corpus possessionis*, *de facto* control, or the like. Every householder or landowner means or intends to exclude thieves and wrongdoers from his property, and this confers on him a special property in goods found on his land sufficient to support an indictment if the goods are taken therefrom, not under a claim of right, but with felonious intent.[13]

[11] *Reg.* v. *Rowe*, *supra*.
[12] *Hibbert* v. *McKiernan*, [1948] 1 All E.R. 860, *per* Lord Goddard C.J. at p. 861.
[13] *Ibid.*, pp. 861-2.

What the Lord Chief Justice appears to mean is that the occupier of land is in possession of everything upon the land as against thieves and wrongdoers. In this case there is no doubt that the appellant was a wrongdoer, a trespasser, but if we attempt to justify his conviction upon that ground we are faced with the rather novel proposition of law that a person may have actual possession (not merely the right of possession) as against one class of person or persons, and not as against others. In other words, had the appellant been a member of the club, or some other person lawfully on the premises, he would have been guilty of no offence in taking the balls. Had the balls been found at the bottom of a water hazard by a workman hired to clean out the trap, it would seem impossible, upon the basis of Lord Goddard's reasoning, to convict the workman of larceny. He could scarcely be called a wrongdoer if he were to take up the golf balls with the intention of selling them or otherwise disposing of them provided they had been abandoned by the original owners, unless they were in the possession of the golf club. Yet such a decision would clearly be at variance with *South Staffordshire Water Co.* v. *Sharman*. The "felonious intent" of which Lord Goddard speaks is of little assistance in fixing liability upon the appellant, since his intent to take up and dispose of the golf balls is innocent unless he deprives some person of his property or interest in them.

Humphreys J. attempted to justify his decision upon similar grounds. In his opinion the decision in the appeal should rest solely upon the answer to the question: Was there evidence to justify the conviction of the appellant of the theft of the balls? and not upon the answer to the question stated by the justices: Would the members of the golf club have had a claim to the balls when found, superior to that of an honest finder of them while they lay upon the golf course. It is quite clear that the two questions are not separate, distinct and independent, for the guilt of the appellant must depend upon whether or not the balls were in the possession of the club. Although the learned judge refers to the appellant as a thief, and to his taking as stealing with an intent to steal, likening his position as a finder to that of a burglar who "finds" jewellery on the dressing-table of a householder, the guilt or innocence of the appellant must in the final analysis depend not upon the intent with which he took the golf balls, nor upon the accusation by the learned judge that he is a thief, but upon whether or not he has deprived some other person of his property or interest in the balls. If no person has a property

or interest in the balls at the time of the taking, then such taking is not theft. Pritchard J. alone based his decision solely upon the possession by the club of the balls. Such a basis appears correct and reasonable, and it may be asking too much to have the inconsistency with *Bridges* v. *Hawksworth* explained as well. Yet, notwithstanding the judgments of the Lord Chief Justice and of Humphreys J., with all respect, the problem of that inconsistency was very definitely before the court.

The conviction can only be supported if it is clearly recognized that the balls were in the prior possession of the club. None of the judges disputed this point, and all were of opinion that the manifest intention of the club to exclude others from the balls lying on the course vested in it and its members an interest that would support a charge of larceny. As an authority they cited *Reg.* v. *Rowe.* But the problems involved in the *Bridges* v. *Hawksworth* line of cases remain unsolved.

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CROWN — ACTION FOR LOSS OF SERVICES OF A SOLDIER.— The recent decision of *R.* v. *Richardson and Adams*[1] merits attention because of the numerous difficult points of law involved. A member of the armed forces, a passenger in an automobile, was injured in a collision between that automobile and one driven by Adams and owned by Richardson, a passenger in the vehicle with Adams. The Crown sued both Adams and Richardson for the damage it sustained in respect of the pay, allowances and medical and hospital treatment of the injured serviceman. The trial judge found that Adams was negligent in not complying with section 39 of the Ontario Highway Traffic Act[2] and that, by virtue of section 47(1) of that Act, Richardson as owner was also negligent. Nevertheless he found for the defendants on the ground that the action *per quod servitium amisit* would not lie at the instance of the Crown for the loss of the services of a soldier. The Supreme Court of Canada reversed this decision on appeal and awarded the Crown the special damages claimed.

The respondents first contended that the Exchequer Court had no jurisdiction under section 30(d) of the Exchequer Court

[1] [1948] 2 D.L.R. 305.
[2] R.S.O., 1937, c. 288.

Act,[3] since the action depended on statute not common law. The court, following *A. G. Canada* v. *Jackson,*[4] conceded that the Crown had to establish that the servant could sue in tort before the action would lie, but held that the action *per quod servitium amisit* was so distinct from the servant's action for statutory negligence that the Crown's action was one within the jurisdiction of the Exchequer Court. There is a little doubt whether the servant must also have a right of action. It may well be enough if the act complained of is wrongful, though not actionable. *Smith* v. *Moss,*[5] where a wife injured through the negligent driving of her husband and thus unable to sue him, was held able to sue his employer, furnishes a valuable analogy and has been followed in the United States.[6]

The next contention of the respondents was that the Crown could not maintain the action because there is no master-servant relation between Crown and serviceman. The court was unanimous that section 50A of the Exchequer Court Act created that relationship. While this seems a sound conclusion, it may be noted that *United States* v. *Standard Oil Co.,*[7] which Estey J. cited in support, was reversed on appeal on this very point,[8] a fact of which the court seemed unaware.

The respondents further argued that the Crown could not rely on section 50A because the accident occurred before that section was enacted. The court rightly found that the section was retrospective in operation.

A more substantial obstacle to the success of the Crown's action was that it had not been instituted within the limitation period of twelve months laid down by the Ontario Highway Act. Kerwin J. swept aside this objection on the authority of *Norton* v. *Jason.*[9] In that case it was held that a father was not prevented from suing on the case for the seduction of his daughter because his daughter's action in trespass was barred by the Statute of Limitations. It is submitted that the position in the present case was radically different from that in *Norton* v. *Jason.* The court had decided that the Crown must establish an act tortious against the serviceman and the lower court had expressly held that the torts against him flowed from breach of the statute. Unlike

[3] R.S.C., 1927, c. 34.

[4] [1946] 2 D. L. R. 491.

[5] [1940] 1 K.B. 424.

[6] *Le Sage* v. *Le Sage,* 271 N.W. 369.

[7] (1945), 60 F. Supp. 807.

[8] (1946), 153 Fed. 2nd 958. The Supreme Court confirmed the appeal court decision on other grounds without considering the master-servant question (1947), 332 U.S. 301.

[9] (1651), Style 398; 82 E.R. 809.

Norton v. *Jason*, therefore, the Crown was relying on part of a statute to found its action and at the same time claiming exemption from another part of that same statute. The writer has recently shown elsewhere that the Crown may not blow hot and cold over statutes, and can only take them as it finds them in their entirety.[10]

If therefore the court were right in their holding that there must be a tort against the servant, then only if the facts constituted common-law negligence by the respondents could the action by the Crown lie. Did they? The trial judge is not reported as having considered the point, but Kerwin J.[11] and Estey J.[12] held that, on the authority of *Samson* v. *Aitchison*,[13] an action would lie at common law against the owner, Richardson. More controversial is the statement by Estey J. alone that "the finding of negligence on the part of respondent Adams was sufficient at common law to support the judgment against him".[14] However, in the report of the trial hearing[15] the only finding of negligence is one of non-compliance with the Act, and there is no finding that the driver had committed any act amounting to common-law negligence.

What gave most difficulty to the court was fixing the damages. All members of the court agreed in rejecting the trial judge's point that "the value of the services of an officer in His Majesty's Forces serving his country in time of war cannot be ascertained in money and conversely the loss of such services cannot be ascertained in money".[16] This is of course in line with the well-established principle that difficulty in assessing damages does not absolve the court from its duty. It was unanimously agreed that the Crown was entitled to hospital and medical expenses and to the value of the services of the injured serviceman lost to it in consequence of the accident. Kerwin J. (Taschereau J. concurring) regarded the amount of pay and allowances received by the serviceman during his incapacity as "some evidence (and therefore sufficient evidence) of the value of his services that were lost by the Crown",[17] and Estey J. and Rand J. regarded it as *prima facie* evidence, with the result that the court fixed that sum as the damages for loss of services. Nevertheless, there

[10] Street, The Effect of Statutes Upon the Rights and Liabilities of the Crown (1948), 7 U. of Toronto L. J. 357.
[11] At p. 308.
[12] At p. 326.
[13] [1912] A.C. 844, at p. 849.
[14] At p. 325.
[15] [1947] Ex. C.R. 55, at p. 58.
[16] *Per* O'Connor J. at p. 62.
[17] At p. 310.

seems much force in the dissent (solely on the issue of damages) of Kellock J. He held that the onus was on the plaintiff to prove the value of loss of services and did not think "that a soldier's pay . . . is based upon the value of the services performed".[18] His illustrations of how the total pay and allowances vary with the soldier's status as a married or single man and the number of his children seem to afford conclusive proof that such a test is not an infallible one and "that it was incumbent upon the appellant to establish by evidence the value of the lost services, beyond the mere payment of the items claimed".

It is surprising that a further point made by O'Connor J. in the Exchequer Court was not discussed in any of the appeal judgments. He quoted Gahan on the Law of Damages[19] as follows:

> The general rule of English law is that nobody can make himself the creditor of another by paying that other's debt against his will or without his consent: *Johnson* v. *R.M.S.P. Co.* (1867) L.R. 3 C.P. 38.43.

Presumably, the argument would be that the respondents owed the serviceman the value of medical expenses and loss of pay, and that the respondents were not to be affected if the Crown chose to pay these for him. Would the right of the serviceman to sue the respondents therefor be affected by the fact that statute authorised the Crown to pay these to the serviceman? There is some authority in the United States for the view that a servant otherwise legally entitled to certain sums may not sue for them.[20] On the other hand, the soldier is not entitled as of right; he has no enforceable right of action against the Crown in respect thereof.[21] Therefore, in an action against the respondents instituted within the proper limitation period, he surely could have recovered these expenses. Whether *Johnson's* case is applicable to these circumstances must await an express judicial determination, but it seems so contrary to a long line of "loss of services" cases that it is unlikely that it will now he held applicable.

It may be observed that the Supreme Court of the United States in *United States* v. *Standard Oil Co.*, turned down the claim of the plaintiffs for loss of a soldier's services for reasons not examined in the present case. Rejecting the alleged analogy to the ordinary action for loss of services, Mr. Justice Rutledge said:

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[18] At p. 318.
[19] P. 94 n. (h).
[20] *Moon* v. *Transit Co.* (1912), 247 Mo. 227; *Pensak* v. *Peerless Oil Co.* (1933), 311 Pa. 207.
[21] *Leaman* v. *R.*, [1920] 3 K.B. 663.

> . . . it is the Government's interests and relations that are involved, rather than the highly personal relations out of which the assertedly comparable liabilities arose. . . . It [the tort law analogy] is advanced rather as the instrument for determining and establishing the federal fiscal and regulatory policies which the Government's executive arm thinks should prevail in a situation not covered by traditionally established liabilities. Whatever the merits of the policy, its conversion into law is a proper subject for congressional action, not for any creative power of ours.[22]

In his lone dissent Mr. Justice Jackson[23] pointed out that this decision would relieve the wrongdoer of part of his normal liability to the detriment of the taxpayer, and thought that the cases where parents and husbands had recovered for loss of services were analogous. The writer supports this dissent.

To sum up, this writer believes that the action for loss of a soldier's services is properly maintainable by the Crown, but that in *R.* v. *Richardson and Adams* it would only lie if a case of negligence at common law and not merely under the statute were made out, and that the dissent of Kellock J. on the issue of damages is to be preferred to the view of the rest of the court.

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LABOUR RELATIONS — ARBITRATION — REINSTATEMENT OF DISCHARGED EMPLOYEES.—Probably one of the most significant developments in the jurisprudence of labour relations in the past few years has been the growing practice of arbitrators to reinstate employees who in their opinion have been unjustly discharged by an employer.

The right of an employer to discharge an employee for practically any cause which he considered appropriate was, of course, unquestioned before the advent of unions. Even in the case of unionized employees, the discharged employee nominally had no right of redress. True, he may have had the right to process his grievance through the grievance procedure, but, except for the threat of a strike, the employer's final decision was basically a unilateral one. Up until a comparatively few years ago, collective labour agreements seldom provided for compulsory arbitration as the terminal point of the grievance procedure. At present the great majority of them do, both in the

[22] *Supra*, footnote 8, at pp. 313-314.
[23] At pp. 317-318.

United States and in Canada.[1] Under agreements containing such clauses, the employer is no longer the sole judge as to whether he has proper grounds for discharging an employee. Arbitrators have taken over this function and a study of the awards reveals that most of them consider that they have full jurisdiction to determine whether there was "just" or "reasonable" cause for discharge; very few have been deterred even by restrictive "management rights" or other limiting clauses.

A recent survey of arbitration awards on this subject in the United States, for instance, revealed the following results (over a five-month period):[2]

Number of employees discharged		41
Reinstated with full back pay	21	
Reinstated with a lesser penalty	9	
Discharge upheld	11	

There is no reason to believe that analysis of Canadian awards would yield a different result. In fact, the few that have been published indicate that Canadian arbitrators also have a propensity for reversing employers' decisions on discharges unless satisfied that they were based on adequate grounds.

In the cases mentioned, the arbitrators obviously had a fairly low opinion of the employers' management capabilities. Management was reversed in 73% of the cases. In fairness to the employers, however, one must bear in mind that their main fault was probably not capriciousness or arbitrariness but rather an understandable failure to bring their personnel practices in line with the standards made necessary by current concepts of the employer–employee relationship. In other words, the arbitrators, in overruling the employers in these cases, were not necessarily intimating that they were unjust or unreasonable employers but rather that discharge is, under conditions of collective bargaining, too severe a penalty for all except the most serious employee offences and unless such offences are clearly established.

Arbitrators have indicated that at least part of the basis for their decisions in such cases is the fact that a discharged employee loses, not only his job, but in most of modern industry

[1] Provision in the collective agreement for arbitration of disputes involving violation or interpretation of the agreement is now mandatory under the labour legislation of most of the provinces of Canada.

[2] Employee Relations and Arbitration Report No. 24, Prentice-Hall Inc., New York.

seniority rights and service rights entitling him to pensions, insurance and benefits under other welfare plans.

This whole question raises problems of considerable magnitude for management. What was once considered a clear management prerogative — the right to discharge employees who do not meet its standards — has become substantially vitiated. It is interesting to note that in the process arbitrators have dared step in where judges have traditionally feared to tread. An award for reinstatement of an employee is essentially an order for specific performance of a contract of personal service. The courts have, in the past, refused to make such orders[3] on the grounds that they could not be enforced against unwilling parties with any hope of success. So far as reported arbitration cases are concerned, there is no evidence that employers have raised any objections on this ground. Probably this is because the enforcement of arbitration awards is normally based on voluntary acceptance rather than legal sanctions.

There is, of course, the further possibility that the reasons underlying the hesitancy of the courts to decree specific performance, in such cases, are not valid under employment conditions governed by a collective agreement, especially when the employer is a large corporate entity. Indeed, it may well be questioned whether an arbitrator would have jurisdiction to make a reinstatement award except on the basis of the collective agreement. If he based his award on the individual contract of employment, the award might be of doubtful legality as infringing upon the jurisdiction of the courts.

Despite these legal considerations, the practical course for employers would appear to be to readjust their personnel practices to conform with the precedents established by arbitrators. The survey by Prentice-Hall, mentioned earlier, points out that arbitrators are likely to reinstate an employee (often with some other, but lesser, penalty) when:

1. the employer does not present sufficient facts or evidence to justify the charge made against the employee;
2. the employer has not followed the terms of his contract (for example, the employer should not fire an employee for absenteeism when he has not made allowance for excused absences as provided in the contract or when the absences were permitted for union business by the contract);

[3] Most recently discussed in *John East Iron Works* v. *United Steel Workers of America*, [1948] 1 D.L.R. 652.

3. the employer has previously condoned the same type of activity for which the employee is fired;

4. the action for which the employee is fired is partly the responsibility of the employer;

5. the charge made by the employer appears to be a cloak for anti-union discrimination;

6. the offence charged, even if proved, is not "just cause" for discharge;

7. the facts do not indicate an offence of the type with which the employee was charged;

8. the employer has not followed his usual procedure in handling a discharge and has, therefore, breached the contract himself;

9. the offence itself is minor and employees have never previously been warned or disciplined;

10. the employee is provoked into his actions and is not the initial instigator;

11. the order was not reasonable and proper (but the employee may still be punished for insubordination if he has not taken advantage of the contract grievance procedure);

12. the employer has placed the employee in a position which he is unable to handle and then discharges him rather than demote him;

13. the company's proof does not indicate as severe an infraction as the charge made against the employee.

It can hardly be said that these rules are unreasonable or impracticable. Application of them before discharging an employee or when considering discharge grievances would likely reduce the incidence of adverse arbitration awards.

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CRIMINAL LAW — CONVICTION FOR COMMON ASSAULT — RELEASE FROM FURTHER OR OTHER CIVIL PROCEEDINGS — SECTIONS 732, 733 AND 734 OF THE CRIMINAL CODE — AMENDMENT TO CRIMINAL CODE.— In the recent case of *Kuczer* v. *Massé*[1] a plaintiff has once again had his civil action in damages dismissed under section 734 of the Criminal Code because he had previously proceeded against the defendant in the criminal courts for common

[1] [1948] S. C. 187 (Que.).

assault. The facts as found by the court were that on November 4th, 1945, the defendant without cause struck the plaintiff several times with his fist, bruising his cheek and breaking his nose. The police were called and the defendant was placed in the cells over night. The following morning the plaintiff signed a complaint against the defendant, charging him with common assault under section 291 of the Criminal Code. Later the same day the defendant appeared before one of the judges of the Sessions of the Peace in Montreal, pleaded guilty and was condemned to pay the costs or, in default of payment, to five days in jail. The costs, amounting to $5.05, were paid. Subsequently, the plaintiff instituted the present civil proceedings, claiming damages of $199 for loss of time and earnings during a period of two weeks, for pain and suffering, and for medical expenses incurred and to be incurred. To this the defendant replied, *inter alia*, by pleading the previous criminal conviction.

On these facts Mr. Justice Collins of the Superior Court was undoubtedly correct, in the existing state of the law, when he dismissed the action. He apparently felt some sympathy for the plaintiff, however, because he exercised his discretion as to costs and condemned him only to pay the costs of the appropriate Superior Court action less the costs of such an action settled after plea filed.

Section 734 of the Criminal Code must be read with sections 732 and 733:

> 732. Whenever any person is charged with common assault any justice may summarily hear and determine the charge.
>
> 2. If the justice finds the assault complained of to have been accompanied by an attempt to commit some other indictable offence, or is of opinion that the same is, from any other circumstance, a fit subject for prosecution by indictment, he shall abstain from any other adjudication thereupon, and shall deal with the case in all respects in the same manner as if he had no authority finally to hear and determine the same.
>
> 733. If the justice, upon the hearing of any case of assault or battery upon the merits where the information is laid by or on behalf of the person aggrieved, under the last preceding section, deems the offence not to be proved, or finds the assault or battery to have been justified, or so trifling as not to merit any punishment, he shall dismiss the complaint and shall [,if requested so to do,] [2] forthwith make out a certificate under his hand stating the fact of such dismissal, and shall deliver such certificate to the person against whom the complaint was preferred.

[2] The words in square brackets were added by section 26 of Bill 337 of the Fourth Session of the Twentieth Parliament, 11-12 Geo. VI, 1947-8. The Bill received the Royal Assent on June 30th, 1948.

> 734. If the person against whom any such information has been laid, by or on behalf of the person aggrieved, obtains such certificate, or, having been convicted, pays the whole amount adjudged to be paid or suffers the imprisonment, or imprisonment with hard labour, awarded, he shall be released from all further or otherproceedings, civil or criminal, for the same cause.

Only in cases of common assault does the Criminal Code purport to bar subsequent civil proceedings and *only* in these cases, so far as I am aware, is an injured person who has proceeded in the criminal courts precluded, in the common-law provinces or in Quebec, from collecting damages in the civil courts.

Before a person may avail himself of the bar to further civil proceedings provided for in section 734 he must show that:

(1) he was charged with common assault, the punishment for which is prescribed by section 291 of the Criminal Code;

(2) the information was laid by or behalf of the aggrieved person under the summary conviction procedure provided for in Part XV of the Code;

(3) the justice in the exercise of the jurisdiction conferred upon him by section 732(1) summarily heard and determined the charge;

(4) either (a) he obtained a certificate of dismissal under section 733 after a hearing upon the merits or (b), having been convicted, he paid the whole amount adjudged to be paid or suffered the imprisonment or the imprisonment with hard labour awarded.[3]

If the defendant meets these four requirements (and assuming that section 734 is *intra vires*), the civil court has no choice but to dismiss the action. However sympathetic it may feel to the plaintiff, it may not consider the circumstances of the assault to see if in fact they constituted a more serious crime than common assault, which, if charged, would not have barred his civil remedy.[4]

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[3] An inscription in law by the defendant is unfounded where the plaintiff's declaration alleged that the defendant was convicted of common assault and condemned to a fine, but not that he paid the fine: *Abinovitch* v. *Legault* (1895), 8 S.C. 525 (Que.).

The Criminal Code does not provide expressly that it is sufficient for the defendant to prove that he was bound over to keep the peace under section 748, but there is judicial authority to that effect: *Trinea* v. *Duleba*, [1924] 3 D.L.R. 636; 42 C. C. C. 292 (Alta. Supreme Court, Appellate Division). The holding in this case seems logical, but it is difficult to reconcile with the rule that sections 732 to 734 must be interpreted strictly and are not open to an extended construction (*infra*).

[4] See *Miller* v. *Lea* (1898), 2 C.C.C. 282, at pp. 286-287 (Ont. Court of Appeal); *Larin* v. *Boyd* (1904), 27 S.C. 472, 11 C.C.C. 74 (Que.); *Hébert* v. *Hébert* (1909), 37 S.C. 339 (Que. Court of Review), confirming (1908), 34

The plaintiff cannot be heard to argue that he might properly have laid a more serious charge. Section 732(2) gives the justice a discretion to send the charge on for trial when he finds that more than common assault is involved, and if he does not exercise the discretion there is nothing the civil court can do.[5]

In one minor respect Mr. Justice Collins implies that the conditions for the operation of the bar are different. He expressed the third condition by saying that the defendant had established "that the case was tried summarily *on its merit* as result of and under the provisions of art. 732 of the Criminal Code". A similar wording has been used in other cases.[6] The use of the phrase, "on its merits", in this connection led Robertson J. in *Kyle* v. *Jamieson* to hold that where the plaintiff had signed the information but had not appeared before the justice, and the defendant had pleaded guilty and paid the fine imposed, there had been no hearing on the merits and the bar against further civil proceedings did not operate[7]— a manifestly incorrect conclusion. The words "upon the merits" appear only in section 733 dealing with certificates of dismissal; under this section the justice is to give a certificate only after a hearing upon the merits.[8] But there need

S.C. 370; *Trinea* v. *Duleba*, [1924] 3 D.L.R. 636, at p. 640, 42 C.C.C. 292, at p. 296. But see *Spenst* v. *Fehr*, [1942] 2 W.W.R. 18, at p. 25, 77 C.C.C. 366, at p. 372 (Man. King's Bench), reversed without reasons by [1942] 2 W.W.R. 477, 78 C.C.C. 128.

There is nothing to prevent an aggrieved person instituting criminal proceedings and at the same time suing for damages: *Hamilton* v. *Crowe* (1897), 40 N.S.R. 217. In the extremely unlikely event that he got judgment in the civil action before the criminal charge was disposed of, the criminal proceedings could presumably be continued. But if it seemed likely that the criminal charge was to be disposed of first, he would have to elect whether to proceed with it and probably bar his civil action or drop the criminal proceedings in order to protect his right to damages.

The question arises whether the defence is a personal one or not. Though it was not necessary to the decision, the Quebec Superior Court in *Dame Audy* v. *Dame Giroux* (1923), 61 S.C. 259, held that a mother sued under article 1054 of the Civil Code for the damage caused by her minor son could avail herself of the bar prescribed by section 734, an extension of the literal meaning of the section. But see *Emerson* v. *The Niagara Navigation Company* (1883), 2 O.R. 528 (Common Pleas Division), *per* Wilson C.J. at pp. 542-543.

[5] It might be noted here that under section 709 no justice may hear any case of assault or battery involving the title to lands, etc.

[6] *Withers* v. *Bulmer* (1921), 61 D.L.R. 642, 36 C.C.C. 177 (Sask. Court of Appeal); *Jude* v. *Archer*, [1924] 1 D.L.R. 448, 41 C.C.C. 289 (Sask. Court of King's Bench).

[7] [1939] 1 W.W.R. 10; 53 B.C.R. 309; 71 C.C.C. 342; [1939] 1 D.L.R. 726 (B.C. Supreme Court). Substantial damages had been suffered in this case and the dismissal of the civil action would have been most unfortunate for the plaintiff.

Kyle v. *Jamieson* was referred to in *Spenst* v. *Fehr*, [1942] 2 W.W.R. 18, 77 C.C.C 366 (Man. King's Bench), which was reversed without reasons by the Manitoba Court of Appeal, [1942] 2 W.W.R. 477, 78 C.C.C. 128.

[8] See *Ghitterman* v. *Ralph*, [1928] 2 W.W.R. 631; 50 C.C.C. 282 (Sask. District Court).

be no hearing on the merits, as those words were interpreted by Robertson J. in *Kyle* v. *Jamieson*, where there is a conviction. If the *Kyle* case was rightly decided, a great many other cases (including *Kuczer* v. *Massé*) were wrongly decided.

Further civil proceedings are barred, then, only where a charge of common assault was dealt with under the summary conviction procedure provided in Part XV of the Criminal Code.[9] The bar is an exceptional one and sections 732 to 734 must be interpreted strictly; they are not open to an extended construction. Thus civil proceedings are not barred if the accused was tried summarily for an indictable offence under Part XVI,[10] even though the magistrate ended by finding the accused guilty of common assault.[11] By section 792 the effect of a certificate of dismissal or a conviction under Part XVI is to release the accused only from further criminal proceedings. Nor, obviously, is there any bar to civil proceedings where the accused is tried before a jury.[12] Finally, there is no bar if a charge for a more serious assault is reduced by the justice to one for common assault without the consent of the person assaulted. This is a reasonable rule because it would be unfair if a serious charge, which does not deprive the aggrieved person of his civil remedy, could be reduced without his consent to one that does; the aggrieved person should not be deprived of his civil remedy without his consent.

The reason commonly given for the bar to further or other civil proceedings set up by section 734 is that to subject a person guilty only of the minor offence of common assault to the annoyance of double proceedings and the burden of double costs would

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[9] *Twiss* v. *Curry* (1915), 24 C.C.C. 438 (Ont. County Court); *Green* v. *Henneghan* (1918), 43 D.L.R. 272, 30 C.C.C. 256 (Alta. Supreme Court); *Guillot* v. *Blumhardt* (1919), 58 S.C. 25 (Que.); *Withers* v. *Bulmer*, *supra*, footnote 6; *Jude* v. *Archer*, *supra*; *Sauvé* v. *Lalande* (1929); 33 Q.P.R. 182 (Que.); *Emery* v. *Lambert* (1930), 68 S.C. 441 (Que.); *Miller* v. *Dubeau* (1936), 75 S.C. 238 (Que.); *Chagnon* v. *Voghel*, [1945] S.C. 142 (Que.).

See also the following cases decided under the Criminal Code of 1892, in which the section numbering differed, or under older statutes containing similar provisions; *Marchessault* v. *Grégoire* (1873), 4 R.L. 541 (Que. Court of Review); *Peltier* v. *Martin* (1895), 8 S.C. 438 (Que.); *Nevills* v. *Ballard* (1897), 28 O.R. 588 (Divisional Court); *Miller* v. *Lea*, (1898) 2 C.C.C. 282 (Ont. Court of Appeal); *Grantillo* v. *Caporici* (1899), 16 S.C. 44 (Que.); *Clarke* v. *Rutherford* (1901), 5 C.C.C. 13 (Ont. High Court). *Contra*, *Hardigan* v. *Graham* (1897), 12 S.C. 177, 1 C.C.C. 434 (Que.), which is no longer good law, if it ever was, for the reasons made clear in *Larin* v. *Boyd*, *supra*, footnote 4.

[10] Part XVI has been thoroughly revised by Bill 337, *supra*, footnote 2. Under the revised Part magistrates are authorized, with consent, to try any indictable offence, except those mentioned in section 583. Presumably the principle stated in the text will still apply.

[11] But see *Prosterman* v. *Plante* (1941), 79 S.C. 123 (Que.), much of the reasoning of which seems to me unsound. Certainly it is contrary to the weight of jurisprudence.

[12] *Clermont* v. *Lagacé* (1898), 2 C.C.C. 1 (Que. Court of Review); *Borduas* v. *Langevin* (1909), 15 R. de J. 433 (Que. Circuit Court).

be out of proportion to the offence. As one judge put it, the section reduces litigation in cases of petty assault "where angry passions were likely to have been aroused".[13] Section 734, in other words, is designed in the interests of the person who commits an assault rather than of the victim.[14] The victim is given the option of laying a charge for common assault in the criminal courts or suing for damages in the civil courts; if he exercises his choice and swears out an information he cannot very well complain when his civil action is barred. Such is the theory and, if the practice accords with the theory, the justification is probably sound.

Section 734 is one of those apparently innocent provisions that are borrowed by succeeding legislatures from older statutes without much consideration. Its origin seems to be an English statute of 1828, An Act for consolidating and amending the Statutes in England relative to Offences against the Person.[15] In 1834, the bar to civil proceedings found its way, with some changes in arrangement and phraseology, into a statute of Upper Canada, An Act to provide for the Summary Punishment of Petty Trespasses and other offences.[16] No similar legislation appears to have been passed in Lower Canada, but in 1841, just after the union of Upper and Lower Canada, the Province of Canada adopted An Act for consolidating and amending the Statutes in this Province relative to Offences against the person, which applied the rule of the Upper Canada statute of 1834, again with some changes, throughout the united provinces.[17] Neither Nova Scotia nor Prince Edward Island adopted legislation barring civil proceedings prior to Confederation, though it is significant that in 1851 the Revised Statutes of Nova Scotia[18] and a statute of

[13] Harris C.J., dissenting, but on another point, in *Rice* v. *Messenger*, [1929] 2 D.L.R. 669, at p. 674; 51 C.C.C. 147, at p. 153.

[14] Though some cases, borrowing the phraseology from English law, seem to imply that the overall object of sections 732 to 734 is to benefit the victim of the assault; he is granted the convenience of proceeding by way of summary conviction, but only on condition that he forego his right to civil damages.

[15] 9 Geo. IV, c. 31, s. 28; the present sections 732 and 733 are traceable to sections 27 and 29 of the same statute. The present English statute is An Act to consolidate and amend the Statute Law of England and Ireland relating to Offences against the Person, 24-25 Vict., 1861, c. 100, s. 45.

The history of section 734 is discussed in *Rice* v. *Messenger*, *supra*, footnote 13.

[16] 4 William IV, c. 4, s. 12; sections 1, 2 and 10 contain provisions analogous to sections 732 and 733. This statute of Upper Canada was declared to be in force for a limited period of four years, but in 1839, by 2 Vict., c. 4, it was made perpetual.

[17] 4-5 Vict. c. 27, s. 28; section 28 must be read with sections 27, 29 and 30. In the Consolidated Statutes of 1859 (C.S.C., c. 91) section 28 appears as section 44.

[18] C. 147, Of Petty Trespasses and Assaults; R.S.N.S. 2nd Series, 1859, c. 147; R.S.N.S. 3rd Series, 1864, c. 147.

Prince Edward Island[19] provided for the summary trial of common assault before justices and barred further criminal, but not civil, proceedings. It has been impossible for me to trace the relevant statutes in New Brunswick, but the Revised Statutes of that province for 1854 contained a bar to civil as well as criminal proceedings.[20]

The first Dominion legislation on the subject was An Act respecting Offences against the Person, passed in 1869.[21] According to the preamble the object of this statute was "to assimilate, amend and consolidate the Statute Law of the several Provinces of Quebec, Ontario, Nova Scotia and New Brunswick, relating to offences against the person and to extend the same as so consolidated to all Canada". By it, where any person unlawfully assaults or beats another person, a justice of the peace, "upon complaint by or on behalf of the party aggrieved, praying him to proceed summarily on the complaint", may hear and determine the offence. Where the person against whom such a complaint has been preferred obtains a certificate of dismissal or, on conviction, satisfies the penalty, he shall be "released from all further or other proceedings, civil or criminal, for the same cause". The successive modifications[22] made in the provisions of the Act of 1869 until they assumed their present form in sections 732, 733 and 734 should be kept in mind when reading the jurisprudence.

No doubt section 734 will be considered when the proposed revision of the Criminal Code is undertaken. From 1884, the first year for which statistics are available, there has been a marked increase in Canada in the number of convictions for most types of assault, including common assault. Thus in 1884 there were 4 convictions for common assault per 100,000 of population; in 1894, 4; in 1904, 8; in 1914, 20; in 1924, 11; in 1934, 11; in 1944, 16; in 1945, 17; and in 1946, 18. Substantial, though varying increases, have occurred in the number of convictions for aggravated assault, assault on a wife, indecent assault and assault on the police. The question of what remedies should be open to the

[19] An Act to provide for the summary trial of common assaults and batteries, 14 Vict., c. 21; continued by 24 Vict., 1861, c. 23.

[20] C. 159, Of Trial, s. 28.

[21] 32-33 Vict., c. 20, ss. 43-46. Section 45 corresponds with the present section 734.

[22] The Summary Convictions Act, R.S.C., 1886, c. 178, ss. 73, 74 and 75; The Criminal Code, 1892, 55-56 Vict., c. 29, ss. 864, 865 and 866 (s. 864 was amended by 63-64 Vict., 1900, c. 46, to come into force on January 1st, 1901); Criminal Code, R.S.C., 1906, c. 146, ss. 732, 733 and 734, which are identical with the present sections.

victim of an assault is therefore of greater practical importance than formerly.

The task of assessing the relative advantages and disadvantages of forbidding civil as well as criminal proceedings for common assault will not of course be easy. On the one hand, no one can say with certainty how many civil actions or criminal prosecutions of a vexatious character have been prevented by section 734, or, on the other, how many times the section has deprived a person assaulted of a remedy he ought to have and enabled an offender to escape more easily than he should. For example, the type of person who likes to engage in "spite actions" may be less, or more, numerous in 1948 than in 1828.

Be that as it may, two arguments at least can be advanced against barring further civil proceedings in cases of common assault. If the only persons charged and convicted of common assault were those who could not have been convicted of a more serious assault, section 734 could cause no particular hardship. In that event it would be difficult or impossible to prove civil damages and, at least in Quebec, a civil action would seldom lie even without section 734. But an aggrieved person must sometimes sign an information for common assault when he has in fact suffered severe injuries and a more serious charge would have been appropriate. Perhaps he was not assisted by counsel when he swore out the information (as appears to have been the case in *Kuczer* v. *Massé*) and was impressed by the advantages of the procedure by way of summary conviction without appreciating the consequences to himself. When this happens, a section designed to protect a person guilty only of a petty assault from vexatious proceedings has in practice relieved a person who has committed a more serious assault from the consequences he deserves.[23]

In passing, it might be remarked that under the existing law a person convicted of common assault probably escapes more lightly in 1948 than he did a hundred and twenty years ago. The English statute of 1828, which made common assault punishable on summary conviction, provided for a fine, together with costs, not exceeding five pounds, a much more serious penalty, with the difference in the value of money, than the maximum penalty of twenty dollars and costs prescribed by section 291.

[23] And what is to prevent the "barrack-room lawyer" from laying some charge more serious than common assault for the express purpose of preserving his right to take civil proceedings? See *Prosterman* v. *Plante*, *supra*, footnote 11, in law a doubtful decision, arising out of an attempt to prevent what the judge apparently thought was such a subterfuge.

Secondly, the bar to civil proceedings is an exceptional provision which has inevitably occupied the time of the courts on a good many occasions (if the reports are a criterion, more often in the Province of Quebec, for some reason, than in all the other provinces combined). As a reading of the cases cited in this note will show, some of this litigation has turned on technical and rather artificial distinctions, and some of the conclusions arrived at by the courts are difficult to reconcile with the reason usually given to justify the bar.

In the uncertainty over whether further civil proceedings should be barred, the temptation will be to leave section 734 untouched. This would be an unfortunate decision. To put it conservatively, a strong case can be made that the section, in so far as it purports to bar further civil proceedings, is *ultra vires* the Dominion;[24] certainly, if it is *intra vires,* there is no apparent reason why the Dominion should not also bar civil proceedings arising out of any crime known to the Criminal Code. While the constitutional question has given rise to considerable litigation, it has never been considered by any court higher than a provincial court of appeal, and is unlikely to be; the sums involved are usually small and the practical results, in most of the provinces, of a Supreme Court or Privy Council decision holding the section *ultra vires* doubtful. Under section 129 of the British North America Act the laws in force in a province prior to Confederation or the date of its joining the Dominion, and never repealed, abolished or altered, continue in force. In other words, even if section 734 were declared *ultra vires* further civil proceedings might still be precluded in many of the provinces under laws in force

[24] The most thorough discussion of the question is contained in the judgment of the Supreme Court of Nova Scotia in *Rice* v. *Messenger*, [1929] 2 D. L. R. 669, 51 C.C.C. 147, where the section was held *ultra vires* by a majority of four to one, and by the Supreme Court of Prince Edward Island in *Dawson* v. *Muttart*, [1941] 2 D.L.R. 341, 75 C.C.C. 340, which followed it.

The following cases have held the section *intra vires; Wilson* v. *Codyre* (1886), 26 N.B.R. 516 (N.B. Supreme Court); *Flick* v. *Brisbin* (1895), 26 O.R. 433 (Chancery Division); *Trinea* v. *Duleba*, [1924] 3 D.L.R. 636, 42 C.C.C. 292 (Alta. Appelate Division); *Dowsett* v. *Edmunds*, [1926] 4 D.L.R. 796, 40 C.C.C. 330 (Alta. Appelate Division), reversing [1926] 3 D.L.R. 367, 46 C.C.C. 211.

The Superior Court judgment in *Hébert* v. *Hébert* (1908), 34 S.C. 370, 16 C.C.C. 199 (Que.), held section 734 *ultra vires*, but dismissed the plaintiff's action under the similar wording of the statute of Canada in force before Confederation (see footnote 17, *supra*), which it held had never been repealed and was still in force. The Court of Review (1909), 37 S.C. 339, confirmed this judgment under section 734, but without expressly deciding the question of *ultra vires*.

The constitutional question has been discussed in a note by Professor Bora Laskin (1941), 19 Can. Bar Rev. 379.

prior to their becoming part of the Dominion.[25] No one can be sure. There were several such laws that have never been repealed. But the section in them barring civil proceedings was closely interwoven with the sections giving justices jurisdiction by way of summary conviction over common assaults, just as the present section 734 is interwoven with section 732 and 733. It cannot be doubted that the sections in these old provincial laws governing the summary jurisdiction of justices are no longer in force. Did the dependent section barring civil proceedings fall with them?

The same result, or lack of it, would follow if those charged with the revision of the Criminal Code should decide that the material part of section 734 should be omitted. But the Gordian knot must be cut somewhere. In my opinion the section should be amended by omitting the reference to civil proceedings. In those provinces in which no law of similar effect was in force at the date on which they joined the Dominion, the result would be that civil as well as criminal proceedings could be instituted. In those provinces in which such a law was in force, a period of legal uncertainty might follow, unless the provincial legislatures acted promptly to clarify the situation, but the confusion would hardly be more confounded than it is at present. In all provinces the decision as to what rule should apply would rest with the provincial legislatures, where, as it seems to me, it should rest.

G. V. V. N.

[25] Reference was made to this result by the Quebec Superior Court in *Hébert* v. *Hébert, supra,* footnote 24, the Appellate Division of the Alberta Supreme Court in *Dowsett* v. *Edmonds, supra,* and the Nova Scotia Supreme Court in *Rice* v. *Messenger, supra.* It is perhaps more than an accident that in neither of the two provinces where section 734 has been held *ultra vires,* Nova Scotia and Prince Edward Island, was there a similar law in force prior to the date of their joining the Dominion, while a similar law was in force in the three provinces where the section was held *intra vires,* Alberta, New Brunswick and Ontario. What is the point of declaring a law *ultra vires* if the result is to refer one back to an older law, the general effect of which was similar but the precise application of which at the present day is uncertain?